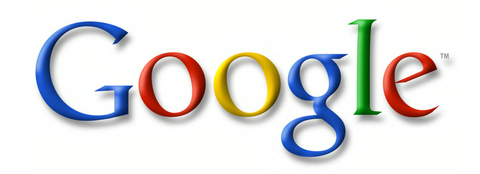
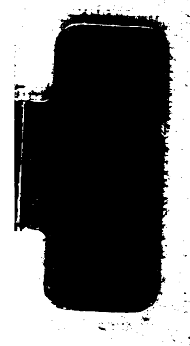








REPORT

OF THE

FIFTH ANNUAL MEETING

OF THE

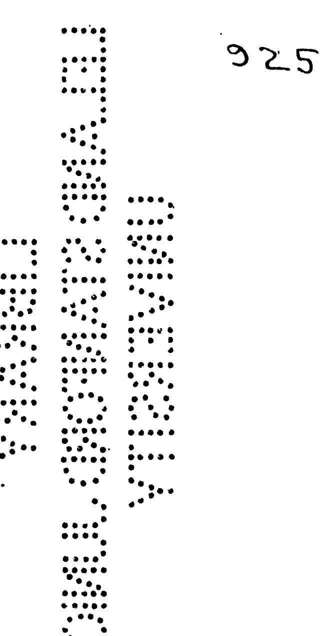
Virginia State Bar Association,

HELD AT

WHITE SULPHUR SPRINGS, W. VA.,

August 1st, 2d and 3d, 1893.

RICHMOND, VA.:
EVERETT WADDEY CO., Stationers, Printers and Binders, 1112 Main Street,
1893.


UNIVERSITY
LELAND STANFORD, JUNIOR
LIBRARY

Members Registered

AT THE

FIFTH ANNUAL MEETING.

Anderson, James Lewis,	Richmond.
Anderson, William A.,	Lexington.
Barret, Benjamin T,	Richmond.
Barton, R. T.,	Winchester.
Bibb, W. E.,	Louisa.
Blackford, Charles M.,	Lynchburg.
Bolling, W. H.,	Wytheville.
Boykin, R. E.,	Smithfield.
Braxton, A. C.,	Staunton.
Brugh, E. J.,	Fincastle.
Buchanan, John A.,	Abingdon.
Burks, M. P.,	Bedford City.
Christian, Frank P.,	Lynchburg.
Christian, Thomas D.,	Lynchburg.
Cochran, George M., Jr.,	Staunton.
Daniel, J. R. V.,	Richmond.
Dabney, W. D.,	Charlottesville.
Davis, Richard B.,	Petersburg.
Donovan, John B.,	Mathews C. H.
Duke, R. T. W.,	Charlottesville.
Duke, R. T. W., Jr.,	Charlottesville.
Duke, W. R.,	Charlottesville.
Dupuy, James A.,	Roanoke.
Echols, Edward,	Staunton.
Fentress, W. A.,	Portsmouth.
Figgatt, J. H. H.,	Fincastle.
Flood, H. D.,	Appomattox.
Folk, W. L.,	Smithfield.
Fulton, J. H.,	Wytheville.
Garnett, Theodore S.,	Norfolk.
Glasgow, Joseph A.,	Staunton.

Glasgow, Frank T., ... Lexington.
Glasgow, W. A.,. Lexington.
Gooch, W. S., ... Roanoke.
Goode, John,. . . . . Bedford City.
Goode, John B., ... Bedford City.
Graham, S. C., ... Tazewell.
Grattan, George G., ... Harrisonburg.
Graves, Charles A., ... Lexington.
Griffin, Samuel, ... Bedford City.
Guy, Jackson,. . . . . Richmond.
Hanger, Marshall, ... Staunton.
Hardaway, W. O., ... Roanoke.
Harrison, George M., ... Staunton.
Hatton, G., ... Portsmouth.
Heath, James E., ... Norfolk.
Henry, R. R., ... Tazewell.
Hicks, R. Randolph, ... Roanoke.
Hopkins, W. S., ... Lexington.
Horseley, John D., ... Lovingston.
Hubard, J. L., ... Norfolk.
Hughes, R. M.,. . . . . Norfolk.
Hunton, Eppa, Jr., ... Warrenton.
Ingram, John H., ... Manchester.
Jackson, E. H.,. . . . . Front Royal.
Jones, S. E., ... Roanoke.
Kean, R. G. H., ... Lynchburg.
Kinney, Thomas C., ... Staunton.
Lacy, B. W., ... New Kent.
Lamb, James C., ... Richmond.
Lassiter, Francis Rives, ... Petersburg.
Letcher, Greenlee D., ... Lexington.
Liggett, Winfield, ... Harrisonburg.
Lyons, James, ... Richmond.
McAllister, J. T., ... Warm Springs.
McAllister, W. M., ... Warm Springs.
McGuire, Frank H., ... Richmond.
McIntosh, George, ... Norfolk.
McLaughlin, William . . . . Lexington.
McRae, W. P., ... Petersburg.
Mann, William H., ... Nottoway.
Marshall, R. C., ... Portsmouth.
Martin, Thomas S., ... Scottsville.
Massie, Eugene C., ... Richmond.
Massie, Frank A., ... Charlottesville.
Meredith, Wyndham R., ... Richmond.

MONTAGUE, E. E., ... Hampton.
MOORE, DAVID E., ... Lexington.
MUNFORD, BEVERLY B., ... Richmond.
MURRELL, W. M., ... Lynchburg.
NELSON, FRANK, ... Rustburg.
NORTON, J. K. M., ... Alexandria.
PAGE, JOHN . . . . Hanover County
PAGE, ROSEWELL, ... Richmond.
PARKER, J. C., ... Franklin.
PARRISH, R. L., ... Covington.
PATTERSON, A. W., ... Richmond.
PATTESON, S S. P., ... Richmond.
PENDLETON, E. M., ... Lexington.
PENN, JOHN E., ... Roanoke.
PETTIT, PAUL, ... Palmyra.
PETTIT, WILLIAM B., ... Palmyra.
PLEASANTS, JAMES, ... Richmond.
POLLARD, H. R., ... Richmond.
PORTLOCK, WILLIAM N., ... Norfolk.
POTTS, ALLEN, ... Richmond.
PRENTIS, ROBERT R., ... Suffolk.
PRESTON, W. C., ... Richmond.
RANDOLPH, THOMAS J., ... Norfolk.
RICHARDSON, D. C., ... Richmond.
RIELY, JOHN W., ... Halifax County.
ROBERTSON, ALEXANDER F., ... Staunton.
ROUTH, HENRY A., ... Lebanon.
SANDS, CONWAY R., ... Richmond.
SCOTT, R. TAYLOR, ... Warrenton.
SMITH, WILLIS B., ... Richmond.
SOUTHAL, S. V., ... Charlottesville.
STEPHENSON, JOHN W., ... Warm Springs.
STICKLEY, E. E., ... Woodstock.
TALIAFERRO, WILLIAM B., ... Gloucester Co'y.
TENNANT, W. BRYDON, ... Richmond.
THOM, ALFRED P., ... Norfolk.
THOMAS, R. S., ... Smithfield.
THOMASON, E. B., ... Richmond.
TUCKER, H. ST. GEORGE, ... Staunton.
TUCKER, J. R., ... Lexington.
TURNER, ROBERT H., ... Front Royal.
TURNER, SMITH S., ... Front Royal.
WATTS, J. ALLEN, ... Roanoke.
WATTS, LEGH R., ... Portsmouth.
WELLFORD, B. R., JR., ... Richmond.

Wickham, William F., ... Richmond.
Williams, John G., ... Orange C. H.
Williams, Samuel G., ... Roanoke.
Williams, Thomas N., ... Clarksville.
Willcox, Thomas H., ... Norfolk.
Wilson, William V., Jr., ... Lynchburg.
Winborne, R. W., ... Buena Vista.
Yancey, Robert D., ... Lynchburg.
Yonge, J. E., ... Roanoke.

Number registered, ... 130 members.

TRANSACTIONS

OF THE

FIFTH ANNUAL MEETING

OF THE

VIRGINIA STATE BAR ASSOCIATION

HELD AT

WHITE SULPHUR SPRINGS, W. VA.,

AUGUST 1ST, 2D, AND 3D, 1893.

WHITE SULPHUR SPRINGS, W. VA.,
Tuesday, August 1, 1893.

Frank H. McGuire, of Richmond, Chairman of the Executive Committee, called the Association to order at 11 o'clock A. M., and said:

It is my duty to call the Association to order and to invite you to listen to the address of our President.

Mr. R. T. Barton, President of the Association, then read his address.

(*See Appendix.*)

The President: I will announce the following committees:

Committee to Recommend Officers—S. S. Turner, of Front Royal; E. E. Montague, of Hampton; Eppa Hunton, Jr., of Warrenton; W. O. Hardaway, of Roanoke; and R. R. Prentis, of Suffolk.

Committee on Publications—B. B. Munford, of Richmond; William A. Little, Jr., of Fredericksburg; and James P. Harrison, of Danville.

James Lyons, of Richmond: Mr. President,—I beg leave to offer the following resolution:

Resolved, That the Committee to Recommend Officers be also authorized to name three delegates to the next meeting of the American Bar Association, which will be held at Milwaukee, Wis., September 1, 1893.

It is particularly proper for us to send delegates there at this time, because our distinguished friend and fellow-member of this Association, Hon. J. Randolph Tucker, is President of that body. It is an honor that he worthily won and as worthily wears. I wish it could have been the pleasure of every member of this Association, as it was mine, to be present at the last meeting of the American Bar Association to hear his address and note the close attention with which it was received. Mr. Tucker, by that address, honored his State, honored himself, and honored the profession he adorns. For this reason I hope it may be the pleasure of this Association to send three delegates to that Association.

The resolution offered by Mr. Lyons was adopted.

The President: The next thing in order is the report of the Secretary and Treasurer.

Secretary Jackson Guy, of Richmond: Mr. President,—In obedience to the By-Laws I proceed to give a brief summary of my transactions as Secretary during the current year just ended, and an outline of the business that is to come before the Association at this meeting.

Immediately after the last annual meeting, a list of the committees then appointed was prepared and distributed, and each committeeman notified of his appointment.

The proceedings of the last annual meeting, together with the reports of the officers and committees and the addresses and papers read—constituting Volume V. of our Annual Reports—were printed and published in the usual manner, and in due time.

A copy thereof was mailed to each member of the Association, as required. There was also printed a special edition of 500

copies of the address of Hon. J. Randolph Tucker, President, and of the paper read by Major John W. Riely, as required by the resolution of the last meeting. There are a number of these addresses still on hand with the Secretary, which are at the disposal of members.

A programme of the proceedings to be had at this meeting, was prepared some weeks ago under the direction of the Chairman of the Executive Committee, and was mailed to each member of the Association. Copies thereof can be had at the Secretary's table for the use of the members present.

It will be observed that under this programme, the President-elect will announce the several Standing Committees for the ensuing year before the adjournment of this meeting, in time for the meeting and organization of those committees on Thursday evening. It is scarcely necessary to say that the object of this is to enable the committees, whose members are scattered widely over the State, to meet and organize immediately upon their appointment, and while they are assembled here. A list of these committees will be posted in the office of the hotel immediately after the adjournment on Thursday morning next.

On page 58 of the proceedings of the last annual meeting will be found a memorandum of subjects referred to special committees for report. One of these is a resolution respecting a mural tablet to the memory of Chancellor Wythe, referred to a special committee, consisting of Messrs. W. W. Henry, R. G. H. Kean, and Ro. M. Hughes.

(*See Minutes Annual Meeting, 1892, pp. 15, 16, 51–2–3.*)

Another is a resolution relating to the preparation of rules and forms under the Code of Civil Procedure, referred to the Special Committee on Law Reform, consisting of Messrs. S. S. P. Patteson, R. T. W. Duke, Thomas S. Martin, George M. Cochran, W. M. Lile, J. Randolph Tucker, and R. T. Barton. The report of this committee was printed, and a copy posted to every member of the Association sixty days before this meeting.

There was also a resolution respecting changes in the judicial system of Virginia, which was referred to the Judiciary Committee.

(*See Minutes 1892, p. 41.*)

I request the members in attendance here, both active and honorary, not to fail to enter their names in the Register of the Association.

We have now on the rolls 431 members. During the year we have lost by resignation three members, and by death four—Col. W. W. Gordon, of Richmond; Major Legh R. Page, of Richmond; Capt. Alex. D. Payne, of Warrenton; and Judge John W. Stout, of Staunton.

The President: Next is the report of the Treasurer.

Mr. Guy read his report as Treasurer.

(*See Report at end of Minutes.*)

The reports of the Secretary and Treasurer were adopted.

The President: The next subject is the report of the Executive Committee.

Frank H. McGuire, Chairman of the Executive Committee, then read his report, which was adopted.

(*See the Report at the end of the Minutes.*)

The President: The report of the Committee on Admissions.

R. R. Prentis, of Suffolk: Mr. President,—The Committee on Admissions is not prepared to make any formal report, because we have been unable to get a quorum together. Only four members of the committee are present at the White Sulphur Springs, whilst five constitute a quorum. We hope a quorum will be here to-morrow morning. There are, however, about nineteen applicants; as far as we know, all are unobjectionable, and will be admitted as soon as we get a quorum. Therefore, I am requested to offer a resolution to this effect:

Resolved, That the privileges of the floor be extended to the gentlemen whose applications for membership are pending before the Committee on Admissions.

I move the adoption of that resolution, and ask for further time for the Committee.

The President: The Committee will be granted further time.

The resolution offered by Mr. Prentis was carried by a unanimous vote.

Jackson Guy, of Richmond: Mr. President,—The Chairman of the Committee, who was detained at home, sent this proposed amendment to Article IV., Section 1 of the By-Laws, and in order to be adopted at this session, notice thereof must be given on the first day of this meeting. That section provides that an application must be endorsed by the member of the committee from the circuit whence it comes. It often happens that the member from that circuit is absent, and hence this resolution:

To amend Article IV., Section 1, of the By-Laws, by adding at the end thereof—

Provided, that if the member of the said committee from any circuit has not registered at any annual meeting, or having registered shall have left the place where any annual meeting is held, it shall be the duty of the President of the Association, on the request of the Chairman of the Committee on Admissions, or in his absence of any member thereof, to designate a substitute for the said absentee, with power to act during his absence, naming one from the appropriate circuit if convenient, or if not, any other member of the Association.

The President: The Chair is of opinion that it is in order to adopt that resolution at once. The By-Laws provide that the Constitution may be amended by a two-thirds vote of the members present at any meeting, provided that if it be an annual meeting, notice of the proposed amendment, subscribed by at least five members, shall be given on the first day of such meeting. It does not say when the notice shall be acted on.

R. T. W. Duke, Jr., of Charlottesville: Mr. President,—I move, then, that we proceed to act on it at once. Difficulties have already occurred where gentlemen have applied for admission and the member of the committee from that circuit was not present. That keeps worthy applicants from joining. I therefore move that the amendment be adopted.

The Chair called for the vote on the resolution, and declared it adopted.

The President: The Report of the Committee on Legislation and Law Reform.

William B. Pettit, of Fluvanna: Mr. President,—We succeeded, I believe, in getting together five or six members of this com-

mittee at our last meeting. We have only had one meeting and that was a meeting gotten up soon after its appointment at the last meeting of this Association. At that meeting the committee did me the honor of appointing me Chairman of the committee. There was just a quorum present, I think. I addressed a card to each one of the members of the committee about a week or ten days ago, requesting a meeting to be held yesterday at this place. I got responses from several who said they would be unable to attend on yesterday, but some said that they would be here to-day. There is not present at this meeting a quorum of the committee, so we have had no meeting; but I ask that we be permitted to report at a later date in the session. I would request the members of that Committee to meet at 6 o'clock this afternoon at my room.

The President: The committee will be allowed further time if there is no objection. The Report of the Judiciary Committee is next in order.

W. B. Taliaferro, of Gloucester: Mr. President,—I have to state for this committee that we have had no meeting since the last meeting of the Association. I had expected a meeting yesterday afternoon, but there was no quorum. Therefore, I wish to give notice that that committee will meet at 4 o'clock this afternoon in the office of the hotel.

The President: If there is no objection, the committee is granted further time. The Committee on Legal Education and Admission to the Bar.

W. A. Fentress, of Portsmouth: Mr. President,—As the member named first on that committee, I will state that we have had no meeting of that committee, and no quorum is now present. If a quorum comes, we may be able to make a report. I hope that we may.

The President: I suppose that the committee asks for further time. If there is no objection, further time will be granted it. The next in order is the report of the Committee on Library and Legal Literature.

Mr. R. M. Hughes, of Norfolk, read the report of this committee. (*See Report at end of Minutes.*)

The President: There being no dissent, the report of that committee is adopted. The Committee on Grievances.

R. S. Thomas, of Smithfield: Mr. President,—That committee has not been called together, because there has been no grievance reported to it. I therefore report that the committee has no report to make.

F. H. McGuire, of Richmond: Mr. President,—I move that a committee be appointed from the Association at large to present fitting memorials upon the death of our lamented members—Colonel W. W. Gordon, Major Legh R. Page, Captain Alex. D. Payne and Judge John W. Stout.

The resolution was adopted, and the Chair appointed for that purpose a committee consisting of Judge B. W. Lacy, of New Kent; S. V. Southal, of Charlottesville; James Pleasants, of Richmond; A. C. Braxton, of Staunton; and J. K. M. Norton, of Alexandria.

The President: The next in order is the report of the Special Committee on the grave of Chancellor Wythe.

R. G. H. Kean, of Lynchburg: Mr. President,—Pressure of business called the chairman of that committee to the far West for the whole summer, and he advised the other members that he would be unable to be present at this meeting. What the committee had done under the resolution of the previous meeting he had taken part in and concurred in. I submit the report of the committee.

Mr. Kean read the report of the committee.

(*See Report at end of Minutes.*)

The President: You have heard the report of the committee. It will be considered as adopted unless there is objection, and so recorded. I will be glad if the Chairman of the Executive Committee will announce the changes which that committee has made in our programme for to-night.

F. H. McGuire, of Richmond: In the absence of Mr. Hurd, who is absent on account of illness, the paper of Professor Graves will be read to-morrow morning at the time appointed for the address by Mr. Hurd. This evening the report of the Special Committee on Law Reform will be brought up, which was con-

tinued from our last meeting, and the whole evening will be devoted to the discussion of that report. It has been suggested that we change the hour of meeting from 8 to 8:30 o'clock, making it a little later.

The President: I have named, to fill three vacancies in the Committee on Admissions, Alexander F. Robertson, of Staunton; A. W. Patterson, of Richmond; and H. D. Flood, of Appomattox.

On motion, the Association then took a recess until 8:30 P. M.

EVENING SESSION.

Tuesday, August 1st, 8:30 P. M.

The Association was called to order by the President.

The President: The order of business for this evening is the report of the Special Committee on Law Reform. The Chairman of the committee will read the report.

S. S. P. Patteson, of Richmond, read the report.

(*See the Report at end of the Minutes.*)

Mr. Patteson: I personally favor one form of action, and think it would be the best to have only one form; but I am prepared to make this concession because I think it would be best to have a bill substantially in this form just read. I move that the report be adopted and that the vote be taken on it in sections.

John Page, of Hanover: Mr. President,—I would like to ask if in drawing that report these gentlemen had before them the Code of New York? Do your recommendations correspond in the main with the Code of New York?

Mr. Patteson: So far as the union of law and equity is concerned they do, but we do not recommend any code of procedure.

Mr. Page: Which would be simpler?

Mr. Patteson: We think this would be simpler—the rules of court or the present forms we have.

William B. Pettit: Mr. President,—Under the By-Laws of this Association, it is made the duty of the Committee on Legislation

and Law Reform to examine and scrutinize every bill that proposes a change in our laws, and to make such recommendations and take such action as they may think expedient to promote anything they are of opinion should be adopted, and defeat everything injudicious. I had requested the members of that committee to be here on this occasion. I have received from the majority of the members responses, setting forth various reasons why they could not be here. I received this evening from Mr. Harrison, of Danville, a letter which stated that the condition of his wife's health prevented his attendance, and asked his absence to be explained. He took occasion to remark that it was a matter of exceeding regret to him not to be able to be here; that he was utterly opposed to the amendments proposed, and he was sorry he could not be here to voice his sentiments. I had prepared, Mr. President, with reference to meeting a quorum of the committee at least, a paper of comments and criticisms on the report made by this special committee. I had taken great pains in preparing it, and while there may not be anything in the objections I make, yet, if it be proper, I would ask permission to read what I have prepared on these various bills. I may say that I believe that a majority of our committee concur in my views. I believe that if we had them here they would adopt this report.

J. Randolph Tucker, of Lexington: I move that the privilege asked for be extended to our friend.

The President: I think that may be recorded as unanimous. I am sure everybody would like to hear what Mr. Pettit has to say.

Mr. Pettit: In the performance of a duty imposed upon them by the By-Laws of the Virginia State Bar Association, your committee respectfully proposes the following comments, criticisms and suggestions upon the bills proposed by the Special Committee on Law Reform, accompanying their report.

The amendments proposed to Section 3246, of the Code, are tautological, supererogatory, and, perhaps, emasculating. That section provides that "no action shall abate for want of form where the declaration sets forth sufficient matter of substance for the Court to proceed upon the merits of the cause." And Sec-

tion 3672 provides that "on a demurrer . . . . the Court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action or defence that judgment according to law and the very right of the cause cannot be given."

Now, in view of these provisions, is it not obvious that "in any action for the recovery of money," it is, *now*, all sufficient "for the declaration to describe, plainly and with reasonable certainty, the contract relied on?" And can it be necessary, at this late day, to provide, anew, that "no demurrer to *such* declaration shall be sustained because of the form of the action?" If "want of form" goes for nothing, can mistake of form go for anything, "where the declaration sets forth sufficient matter of substance for the Court to proceed upon the merits of the cause?"

And as to simplifying the declaration, can a simpler one be devised than that which was sustained in *Henderson* v. *Stringer*, 6 Gratt., 131, decided in July, 1849?

What is meant by the provision "the common counts, with a bill of particulars, may in any such cause be made a part of the declaration," it is hard to form an exact conception of. The common counts, as ordinarily used, are of necessity parts of the declaration, and the pleader is at liberty to use them, and does generally use them, *ad libitum*. And Section 3248 requires a bill of particulars to be filed with them in every action of assumpsit; and Section 3249 authorizes the Court to require such bills to be filed with them "in any action or motion," by either the plaintiff or defendant. What the occasion, what the reason, for this interpolation? Or, what is its meaning?

Do not these amendments proceed upon the misconception that our system of pleading permits the parties "to conceal as much as possible what was going to be proved at the trial," as stated in the address of our last President, and was there ever a graver misconception?

It is well to quote here Section 3249 in full:

"In *any action* or motion the Court may order a statement to be filed of the particulars of the claim, or of the ground of defence; and, if a party fail to comply with such order, may, when

the case is tried or heard, exclude evidence of any matter not described in the notice, declaration, or other pleading of such party, *so plainly* as to give the adverse party notice of its character."

What is proposed as an amendment of section 3269 is not in fact an amendment of that section, nor does it contain matter germane to it.

It first proposes to abolish "general issues" in all civil actions, such as "non assumpsit," "not guilty," "*nil debet*," &c., which, in a note, it is said, "frequently convey to the plaintiff no idea of the real defence relied on." It is readily conceded that the plaintiff himself may be, and is, generally, ignorant of the defence indicated by these symbolical terms, as they are called, but as to his counsel, if fit to represent him this suggestion cannot be accepted. They very distinctly indicate to such counsel the defendant's real defence in most cases, if not in every case, but if he has any doubt the provisions of section 3249 are at his command for his relief.

The radicality of this provision does not end here. "There shall be no such plea allowed as that known as the general issue" is the provision. Suppose the action be common assault and battery, and the defence is that defendant did not make the assault and battery charged; or suppose the action be assumpsit or a complaint, if the former term be too antiquated for modern ears and eyes, and the allegation be that defendant bought goods of plaintiff and refused to pay for them, and the defence be that defendant did not buy and did not promise to pay for the goods, must not his plea in either case be, in substance and effect, just such plea as is now known as the general issue? What else can it be? And if "no such plea shall be allowed," he will be as helpless as the sheep upon the shambles, and must be shorn at the pleasure of the plaintiff.

But next, it is provided that "no special form shall be required in any plea save pleas in abatement"; and "every plea shall be in writing and shall state concisely the real defence relied on." This latter requisition contains nothing new. The law, except in the remote past, always required pleas to be in writing, and our statutes and decisions have long since provided and declared that pleadings shall set forth plainly and concisely the ground of

action or defence, and that where this is done any objection to them shall be overruled; and where it is not done the Court may require it to be done. The residue of this proposed section is a repetition of section 3249, and of familiar rulings of the Court in practice.

As intimated, pleas amounting to the general issues are those upon which most actions are tried; and their well-known general effect is to put the plaintiff upon the proof of the case made by his declaration. Is this a hardship on him? Surely not. Then why put the defendant or his counsel under the burden of actually reducing to writing all such pleas; or, really, of devising or endeavoring to devise some plea, if that in any case be possible, which shall have the effect above indicated, and yet shall be "such plea as that known as the general issue"? Save us from such unnecessary writing and such unreasonable iconoclasure!

Chitty, Vol. I., pp. 233–34, says: "The principal rule, as to the mode of stating the facts, is that they must be set forth with certainty; by which term is signified a clear and distinct statement of the facts which constitute the cause of action or ground of defence, so that they may be understood by the party who is to answer them, by the jury and by the Court." What more simple, what more appropriate than this can be wished for?

As to the abolition of the general issue, a distinguished lawyer long ago (1834), in his comments on the Report of the Commissioners, in 4 William IV., said: "My experience has given me a decided opinion in favor of the general issue. If the pleader could know all the facts precisely as they are to be proved, it would be well to confine the pleading to a simple statement of those facts. But every practitioner will at once admit that the pleader seldom or never has the facts perfectly before him, and that in many cases it is not in the nature of things that he should. This unavoidable uncertainty as to the facts at the time of drawing the pleading, I take to be the great essential cause of the difference in opinion between the theorist and practitioner." And it is pertinent to remark that the report of these Commissioners, and the discussions *pro* and *con* at that time on this subject were well known, and doubtless well considered by the distinguished revisors of the Code of Virginia of 1849, as well as by those of

the Code of 1887, and the fact that they refused to do what is now asked for, is the strongest argument against it.

The proposed amendment to section 3271 is that "all demurrers shall be in writing, and shall state specifically the grounds of demurrer relied on. And no grounds shall be considered other than those so stated." The Special Committee seem to have the *cacoethes scribendi* badly, and to desire to compel us all to take it. Good Lord, deliver us!

All demurrers are now required to be in writing. True, counsel do not always write them out; but the clerk, in making up the record, does. The effect of a general demurrer is well understood. In the language of the Court, in *Mowry* v. *Miller*, 3 Leigh, 591, decided in 1832, before most of us were born: "On general demurrer to a declaration the Court looks always to the substantial meaning of its allegations to ascertain whether it states good cause of action." The pleader ought surely to be ready to show that, in substance and effect, he has stated a good cause of action, or a good defence; and in practice the demurrant always states orally more specifically and fully the grounds of his demurrer, if he thinks there are really any, than he could be expected to do in writing. But whether he does it in one way or the other way, he may, through ignorance or carelessness, fail to state a good ground, which, nevertheless, really exists; and if this good ground is not to be considered by the Court, because not stated, then the court will be bound to give a judgment which it sees is unjust and wrong, and the client must suffer for the ignorance or carelessness of his counsel. Is it not better to let the duty of the Court remain as it was in 1832, and still is, and require it upon demurrer to ascertain the substantial meaning of the allegations, and give judgment according to "the very right of the case," instead of hampering it, and compelling it to give an unrighteous judgment, as would be the effect of the proposed amendment?

Besides, this amendment is a departure from the principles and schemes of the reformers, so-called, themselves. There, as to statements of facts, they authorize or tolerate great looseness or liberality, and broad comprehensiveness and succinctness; while here, as to the law, a particularity of statement is required which smacks of Sergeant Saunders' day, and which will lead to like miscarriages of justice.

To the proposed amendment of section 3267 there is seen no grave objection, to one branch of it at least; but there is seen no occasion for it, inasmuch as it was, long ago, (1834, 5 Leigh, 268, *Carthrae* v. *Clarke*) decided that the "omission to conclude a plea or replication either one way or the other is not so essential as that judgment may not be given according to law and right." This was under the statute of jeofails of 1789 or 1819, which has been since much liberalized. But the part which takes away from the defendant the right to plead over to new matter brought forward by the plaintiff in his replication is anomalous and reprehensible.

The amendment now criticised is bill X., on page 12. By bill IV., page 9, this same section 3267 is repealed; so that it is first repealed and then amended!

The amendment proposed to section 3286 is altogether commendable. It simply makes the rule now applicable in assumpsit applicable in any action on contract.

It is not perceived that any good can result from the proposed lopping off of a part of section 3272, and the expense of the amendment should not be incurred.

The proposed "bill to regulate proceedings in jury trials in civil cases" is obnoxious and open to the gravest objections. Scarcely anything is more prominent in our past governmental history—constitutional, legislative and juridical—than the policy and principle of preserving intact our system of trial by jury. Our present Constitution, made with reference to the system as it is, and has long prevailed, declares "that in controversies respecting property, and in suits between man and man, the trial by jury is preferable to any other and ought to be held sacred." This is copied from the Virginia Bill of Rights, adopted in 1776, except that the word "ancient" is dropped from where it was there placed, before "trial," it being there "the ancient trial by jury," instead of the "trial by jury." In such high estimation was this ancient trial by jury held by our Revolutionary fathers that the Seventh Amendment to the Constitution of the United States provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-

examined in any court of the United States, than according to the rules of the common law."

Numerous are the decisions of the Supreme Court of Virginia enforcing the rigid preservation of this sacred palladium of our civil rights and reprobating the slightest invasion of it by inferior tribunals. Any—the least—intimation by the *nisi prius* judge of his opinion as to the sufficiency, the credibility or the weight of evidence, has ever been promptly resented and condemned; and it has been over and over declared that the fact that the Judge differs in opinion from the jury as to the facts—as to the weight and sufficiency or credibility of the testimony—and would, if upon the jury, have found a different verdict, does not justify him in setting aside its verdict. He may, in exceptional cases, set aside verdicts and grant new trials, but this is the fullest extent of his power; and the Legislature has provided that this power shall not be exerted more than twice in favor of the same party in the same cause.

The Special Committee truly remarks that this bill involves "quite a radical change from the rule at present in Virginia." It is so "radical" a "change from" it that "the rule at present in Virginia" would no longer exist. Give the Judge the power to "sum up the evidence; and charge the jury as to the law applicable to it," and nine times in ten, the verdict will be more that of the Judge than of the jury; and the system, as our fathers knew it and so sedulously sought to preserve it, will be gone, and might as well be literally, as it will be substantially, abolished. It cannot be literally abolished without a constitutional amendment. Does any one suppose that such an amendment can be made? Of course not. Nor would the proposed bill stand any better chance of adoption by the tribunal that would have to pass upon such amendment. This Association, we trust, will refuse to enter upon so radical a change and departure from old landmarks and safe precedents.

The "bill to simplify the mode of procedure in actions at law and in suits in equity," is not consistent with this, its title. The first section of it is confusing, occult and indefinite, containing the seeds of litigation, if anybody shall ever see, or think he sees, his way clear to invoke the application of any provision con-

tained in it. What there is in it to "simplify the mode of procedure" cannot be discerned by us.

And certainly there is nothing in the second or the third sections simplifying the mode of procedure.

But, under the second, if a plaintiff brings his suit in equity and files his bill, claiming that the defendant casually found and unjustly withholds from him his spotted calf, of the value of $25, and asking the Court to compel the defendant to surrender it, the Court shall not dismiss his bill, but shall transfer the case to the law docket, and "shall designate the proper form of action"; that is, counsel and advise the plaintiff that he made a mistake in filing his bill, and that detinue was the proper action; and then grant him leave to amend, either as to parties or pleadings, to such an extent as may, to the Court, seem necessary to afford proper relief. And the defendant, though his objection to the bill is sustained, is allowed no costs; and yet, by this false clamor, he is kept in attendance on the wasted first term of the Court; and if, under the active aid and advice of the Judge as to the form of the action and pleading, the plaintiff shall at a succeeding term recover a judgment, there is nothing to save the defendant from paying the costs of the plaintiff's first mistaken suit. And so, if the plaintiff makes the mistake of suing at law instead of in equity, similarly clumsy, incongruous, and, to the defendant, unjust and wasteful transfers, changes and modifications of pleadings are provided for.

Taking a hint from the wise men of our last Constitution-framing Convention, this bill concludes with the injunction that it shall be liberally construed, "to the intent that justice be not delayed or denied by reason of the form of the proceeding." If not to be delayed or denied by reason of the form of the proceeding, why not try the question of withholding the calf upon the original bill; and why give leave to amend pleadings, which necessitates the delay of one term? And as to the cases to be bandied about between the Chancery Court of Richmond city and the Circuit Court of Richmond city, what possible gain of time is there to be had? And suppose the Judges of these courts differ as to what is the proper procedure, and, for instance, the Chancery Court having transferred the bill for the calf to the

Circuit Court, and designated the form of action to be detinue, the latter Court should hold that it had no jurisdiction of the incongruous proceeding? In so plain a case no such trouble is likely to arise, but generally such transfers will be made in cases involving doubts and complications, and the two judges may very well differ in opinion.

And, after all, the Appellate Court may not think that the action or suit, in a case involving real doubt or difficulty as to the remedy, was originally rightly brought, and send it back to be tried accordingly, or reverse and dismiss it.

The title to the bill is misleading, and it embraces more than one object, neither of which is expressed in the title. The first section seems to be aiming, in an indefinite way, towards what is already consummated in section 3299 of the Code of Virginia. If anything further is intended, we cannot conceive what it is, and we ask for specifications. We append a copy of section 3299: "In any action on a contract the defendant may file a plea, alleging any such failure in the consideration of the contract, or fraud in its procurement, or any such breach of any warranty to him of the title or the soundness of personal property, for the price or value whereof he entered into the contract, or any other matter, as would entitle him either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract; or, if the contract be by deed, alleging any such matter arising under the contract, existing before its execution, or any such mistake therein, or in the execution thereof, or any other matter as would entitle him to such relief in equity; and in either case alleging the amount to which he is entitled by reason of the matters contained in the plea. Every such plea shall be verified by affidavit."

The proposed amendment to section 2901, though unnecessary, contains, perhaps, nothing dangerous or vicious. But there is no sort of occasion for it. An action of detinue or of trover, when the thing sued for is in existence, may, under the law as it is, be adopted by the plaintiff at his election. If he wants the property itself, he will bring detinue; if he wants damages for its conversion, he will bring trover. Surely the defendant is entitled to

know which of the two is claimed. It may be added that the effect of the enactment would be to enable a plaintiff to bring detinue for an ox that had been not only converted but eaten up.

The amendments proposed to sections 2717 and 2734 are intended to make these sections conform to such of the amendments as are above censured and opposed, and should fall with the latter. They are objectionable in other respects, and would have the effect of unduly hampering the defendant in actions of unlawful detainer and ejectment.

Indeed, there are many things in the bills and amendments proposed which seem to be based on the idea that plaintiffs are to be made, or are and should be, the special favorites of the law, and of the courts. But the most glaring illustration of this is found in sections 11 and 13 of the act found in the Appendix to the report, pages 22 and 23, which is favored by the Special Committee, but not reported for action now, with comments and criticisms, upon which act we will not, therefore, now unduly occupy the time of the Association.

Mr. Pettit: I have labored to conceive of any equitable defence the defendant may make that is not already provided for by this Section 3299. What imaginable equity may exist that may not be brought forward and availed of under the statute as it now stands, I cannot see. I do not think that I am entitled to occupy the time of this Association any longer; and I think I have given expression, in what I have written, to my views as well as I could in any oral argument.

George M. Cochran, Jr., of Staunton: Mr. President,—I feel very much gratified at the report presented by the gentleman from Fluvanna. I trust the other members listened as attentively as I did. The gentlemen tell us frankly that their object is practically to do away with our present common form of pleading. Now, sir, I believe that a very large majority of the Bar of our State are opposed to this bill; and if most of our lawyers are opposed to it, and the majority of us do not favor this reform, why should we take the preliminary steps? I believe that we will emasculate and confuse the most perfect system of procedure that exists. I think that Virginia owes a debt to

Conway Robinson and John M. Patton that she can never repay for their codification of the Virginia Statutes. They have eradicated everything that was regarded as technical in form, and retained everything that was essential; and if that had been done in New York, I am told, Mr. Patteson would never have had the Revised Procedure of New York to consult in drawing this bill. It is because New York never did what Mr. Robinson and Mr. Patton did for Virginia that she has what we are now asked to adopt. These gentlemen tell us in plain words what they are after. I think it is dangerous to follow them. There is room for compromise in this matter. I think by a simple amendment of our Code we can give them what they ask for, and that is in the fifteen days' notice for judgments. I offer as a substitute for all these amendments a bill to that effect. I offer this, Mr. President, as a substitute for what has been presented here in the form of distinct bills, and ask that the assembly consider it:

"*An Act to amend and re-enact section 3211 of the Code of Virginia, in regard to judgments at law on motion after fifteen days' notice.*

"Be it enacted by the General Assembly of Virginia, That Section 3211, Chapter 156, of the Code of 1887, be amended and re-enacted so as to read as follows:

"**Section 3211. Remedy by judgment at law on motion after fifteen days' notice; when notice to be returned to the Clerk's office; provision to prevent discontinuance of motion.**

"Any person entitled to recover by action, money on any contract, express or implied; damages for any wrong or injury; or specific personal property with damages for the detention thereof, may, on motion before any Court which would have jurisdiction in an action, obtain judgment for such money, damages, or specific personal property, after fifteen days' notice; which said notice shall clearly set forth in writing the nature of the demand, with a proper bill of particulars if the same would be required in an action, and shall be returned to the Clerk's office of such Court ten days before the commencement of the term; and the proceedings thereon shall in all other respects conform to the law and practice regulating pleadings in personal actions, except where it is otherwise specially provided. A motion under this section, which is docketed under section 3378, shall not be discontinued by reason of no order of continuance being entered in it from one day to another, or from term to term, but said notice

shall in all respects be treated as a formal declaration. This section shall not be construed as intended to effect the remedy by motion given by the preceding section."

Now, Mr. Chairman, by an amendment that does not contain over four lines, I think I give to the reformers everything they can wish for. They ought to be satisfied with that. If they don't choose to draw a declaration in debt, or assumpsit, or detinue, or trover, let them give the fifteen days' notice and move the Court for judgment. All that is now required is for the lawyer to state his case with sufficient clearness and the Court will sustain him. I move as a substitute for this report this amendment. We have practiced under the old system for forty years in actions on contracts, and I do not care what procedure you go under, you must state clearly and distinctly what is the grievance you suffer, and what the relief you want is. That is the entire object of pleading. After examining the Code Pleading with some care, I state that our form of procedure is infinitely more simple than the Code procedure. If any man thinks that Code procedure will save time and trouble and labor, he never made a greater mistake on earth. It will put two hundred lawyers in this State to work for years to learn the new procedure, and when they die they will not know as much of the new procedure as they do now of the old.

R. T. Barton, of Winchester (Judge Legh R. Watts, of Portsmouth, in the chair): Mr. Chairman,—I plead guilty to the authorship in the main of this report that has been so criticised, and I cannot sit by and let anybody else bear the blame. It is true I have not drawn all of these sections; the one most criticised was from the pen of my friend, Mr. Kean. Nearly all of them, however, were my suggestions originally.

Some two years ago I thought like my friend, Mr. Pettit; and law reform was to me as a red flag is to a bull, and I charged at it with as little discrimination. But more than a year ago I ascertained this fact, that instead of there being a strong feeling in favor of retaining our common law system in this State, there was a ground-swell that threatened to substitute something to stand like a stone wall, not to be scaled in the path of the attainment of true reform. That was my belief, after careful exami-

nation, when the Senate passed a system of pleading which I think would not only have been a wall in the path of justice, but destruction, as long as it existed, to the ascertainment of truth and fair judgment in any Court in this State. Unless this body comes to the rescue and proposes some reasonable reform, that which passed the Senate and only failed in the House by not being reported from the committee in time, or something worse, will become the law in Virginia. That led me carefully to examine whether I was thinking from the prejudices of an early education and affection for the very name of these common law forms, which, as far as I could express any affection in such a matter, I really loved. I say I came to consider whether or not I was influenced by affection for these things derived by a constant study of them. I examined this question in fear and trembling. I soon became satisfied that the reason I had objected to law reform was that I had never examined into it, and had let prejudice take the place of information on this subject. I ascertained this: That twenty years ago in England the common-law system was abolished; that in every State of these United States, except the States of New Jersey, West Virginia and Virginia, this system had been modified and changed. In West Virginia to-day the Supreme Court has declared that in an action on a bond or sealed instrument, the Court should not be controlled by the names of things, but by the right of things; has declared that the province of a court is to pass on the merits of a case, and not waste time on mere questions of names of things or pleas; and that when courts sit and try cases, they must try whether A or B is entitled to the subject matter of the suit, and not whether he is suing for a spotted calf by detinue or bill in equity.

I said a year ago that I was a proselyte without zeal. If I know anything about anything on this earth, it is about the common law practice and pleading. It never offered any insurmountable obstacles in my way. I was not complaining. But I believed that I was obliged to consider this—that if we did not take steps in this direction somebody less able than we would do so; and one year ago, when I said before this Association what some of us remember, I found that my learned brother, Mr. Tucker, had reached the same conclusion that I had.

I think this one form of action is wrong. We put that on to perfect the system already reported—a system merging law and equity. I find one difficulty in the way of its adoption which seems to me to be insurmountable, and that is the constitutional provision already referred to.

But I see that there is a strong feeling in Virginia in favor of changing our common law method of procedure, as strong a feeling as there is in favor of any doctrine. There is a demand from the people for this change. Every reform granted must be granted in the way of good, not of evil; and it was in that spirit of compromise and moderation, hoping to be able to present to the people these reforms that were demanded, and save to ourselves the names and shapes of these old common-law remedies, that this report was considered. My friend, I cannot vie with him in wit; it is very easy to get up and read a paper and say that this bill is occult, and that you cannot understand it; but it is hard to think that my friend from Fluvanna (Mr. Pettit) is doing justice to himself. To my mind, every line and every word and every sentence of each bill is so luminous and clear that he who runs may read. Has my friend given the matter full investigation? Is he not doing to-day what I did some years ago; has he not written and spoken altogether from his affections? I will prove it to him. He said that one clause of the bill repealed a section of the Code and another clause amended the repealed section. How did you study this amendment, my friend? If you had laid them side by side, you would have found that the repealed section was 3267 and the section amended was 3269, and that the printer put both 3267. You either did not do that or you did it so carelessly that you did not observe that there were two sections instead of one referred to. *Falsum in uno, falsum in omnibus.* If my friend did not do that, no matter how witty his criticisms, they are not worth the paper they are written on.

I will not occupy the attention of this Association very long; I regret that I am obliged to be so much before it. The modern demand for reform is set forth in the English Code, in the Connecticut Code, and in the Massachusetts Code. I found the New York Code full of dangerous pitfalls. That State did not adopt a new Code, but grafted on some portions of the Code prepared

by Mr. Field to the old method. The new wine has burst the old bottles. The Code of David Dudley Field was never adopted in New York as a whole, but extracts from it have been sewed on the old Code, and the New York Code is an example to be avoided. The Codes we examined were the Massachusetts Code, the Connecticut Code, and the English.

I consider that, sentiment out of the question and affection being disregarded, this single action scheme is likely the one to which the State will finally come. But the Committee passed that by for the present and does not propose that we must adopt that; but says that when we adopt a new Code then it will be time to engraft into it the scheme set out in this Appendix, or one like it. The Committee says that all the provisions are not favored by any of the Committee. I know that thirty-eight years elapsed between the codification of 1849 and the revision of 1887, and I do not anticipate that there will be a new revision that will bring in this single form of action within any shorter time than that. But we could not say what might be the pleasure of this Association or the desire of the Legislature, and hence we reported the scheme at this time. So far as we are concerned, we believe that at some future time, when it should be decided to adopt a new Code, then it would be time for the revisors to consider the system suggested in this Appendix.

The just demand of those who stand upon that Appendix is, that when a man has a cause of action, he must set forth the merits of his action; and that when one denies the truth of the allegation, he should state in what he denies it. And again, when plaintiff brings an action and defendant says that it is not good in law, don't carry him over from term to term, and from year to year, and then finally decide that it is not good, but say at once why it is not good in law. They ask that if a man mistakes his forum, and brings a bill in equity when he should have brought an action at law, don't tide him over from year to year until the Court says that it should have been brought at law, and then when he brings his action at law the Statute of Limitations shuts him out. The Courts are not here for that purpose. They are not here to eject suitors, but to protect their rights; and when he has made a mistake in his forum and brought the wrong kind of suit,

the Court should say to him: "You have come to the wrong door for relief; you can't come in this door, but I will show you the right one." These were the general demands without entering into greater details.

Turning first to the question of amending the statute as proposed by Mr. Cochran, to see whether or not, not being favorable to the adopting of this one form of action, all reasonable demands for reform may be met, the first thing is to consider whether or not you cannot simplify the multiplicity of remedies now existing. A man brings an action of assumpsit on this piece of paper, on his policy of insurance, hardly ever with a seal. Maybe away off down in the fine print there is something called a seal, stamped there by the printer, who doesn't even know what it means, and the man who gets the policy doesn't know what it means. This action of assumpsit has been duly brought; the Court looks at the policy, and says to him: "You can't maintain this action because you didn't bring an action of debt." He is ejected from the court, and when he brings a different form of action he is ejected by the Statute of Limitations. Is there right or justice in anything like that? When a man is turned out in the cold absolutely, deprived of his patrimony, it is his right to go into Court and attempt to obtain his own, and not be troubled by the mere names of actions. He is not concerned about covenant, or debt, or assumpsit; and he stands amazed when his counsel says to him: "Your suit went against you; I brought assumpsit when I ought to have brought debt"; and he says: "What is this thing called assumpsit, or debt, that keeps me from getting justice? I don't know anything about that!" And what can you answer, here or hereafter?

Suppose the plaintiff files his declaration and the defendant pleads covenants performed, or *nil debet*, or non assumpsit. What suggestion does that offer to the plaintiff as to what he is expected to prove? He goes to the defendant and says: "I want to know what your defence is." Defendant says "covenants performed," or "*nil debet*," or "non assumpsit." He says: "What the d——l is that?" I go to Mr. Pettit and ask him what he means by his plea of non assumpsit, and Mr. Pettit can't tell me. He says: "Non assumpsit." It don't mean anything unless you happen to know exactly what it is. And so with "*nil debet*"; and "not

guilty" does not tell any more. And Mr. Pettit calls that a warning to the plaintiff! And the plaintiff must perfect his action and examine witnesses with no idea of what the case is that he must support!

But my friend says that if you do not know what the plea means you can call for a bill of particulars. I ask every lawyer in this house when he ever called for a bill of particulars that he got a bill of particulars! I have been called on for it, but I was particular not to give a bill of particulars. It is idle to sit back and talk about that being a remedy!

The next one I refer to is this: If a man mistakes his remedy and comes up here to equity with his case when he ought to have gone to law, why should you object, if the object of suitors is to ask for a determination of the right—why should any man object—if he asks that the Court should say to him, when he comes into equity through mistake: "Your remedy cannot be had in equity. I will send you to an action at law, where you can get your remedy. I will not feed you with these husks of corn, but I will give you a remedy that, if you have right, will determine it without frittering away your time." Now, what is more sensible than this proposition? I venture to say this, that there are few, if any, judges who will not say that a large portion of the time of the courts is taken up in determining forms not right—that is, in determining questions of pleading. What is pleading, after all? Nothing but stripping off the non-essentials to get at the merits of the matter—simply breaking the shell on the outside of the walnut. It does not in any way determine the right of the action, or else why should you have pleading at all?

I simply warn you, gentlemen of the Bar Association, that you may treat this thing idly if you choose, you may listen to a smart criticism if you wish, but I warn you that unless this Association now, at this session, adopts some conservative scheme of law reform and urges it upon the Legislature, some scheme not conservative will be adopted. I do not mean to say that this is a perfect system; I do not stand by the exact words of each of these sections; but I do say that they are the result of hard, earnest labor and a conscientious desire to reach a solution that will be a solution of this much vexed question. I entreat the Association

to treat it carefully and prayerfully, and to say that some measure of reform shall be adopted by us at this meeting.

G. D. Letcher, of Lexington: Suppose you cite to the Association the practical workings of some of these systems you have referred to?

Mr. Barton: There is no objection to them in practice. I never heard a single voice raised in objection to the Connecticut mode of procedure. Of all, I think the Massachusetts system the best, and this proposed system of ours is based on the Massachusetts system.

Mr. Pettit: The speech made by my friend from Winchester (Mr. Barton) makes it proper for me to make a few remarks. He criticises my failure, as he claims, to make reasonable discrimination between two sections mentioned in their bill. I assure him that I was astonished when I came to find that mistake in their book. I thought it was a mistake made by some member of the Committee, and I believed that their bill was reported by another member of the Committee who had not noticed the first bill. I did not examine any ear-marks which would enable me to tell that the Committee, when they used the number 3267, meant 3269.

I regret to say that my friend has failed to relieve my mind of the difficulty he thinks it very singular that I should entertain as to the meaning of the amendments providing that a Court shall administer law and equity in every case before it. I had stated that, under our statute section 2239, every imaginable equitable defence could be made in any action on any contract, and I asked whether any single equity not provided for under that section could be mentioned by any member of the committee. He has failed to mention one.

Mr. Barton: The section you read is confined to failure of consideration and set off.

Mr. Pettit: No, sir. Everything, anything, that entitles the parties to relief in equity.

Mr. Barton: The section is in the chapter on set off, and hence is confined to set off.

Mr. Pettit: It is very broad, and seems to me to provide for every conceivable equitable defence. The revisors say: "If there be any other matter, he may bring it forward in his bill."

Now, as to the general issue. I think if you will go back, you will see that the many defences that have been permitted in pleading the general issue in different actions have been permitted by the rules of court, and for the purpose of preventing failure of justice. It must have occurred to every member of the bar that at some time or other he has discovered from the evidence introduced by the plaintiff a substantial defence to the plaintiff's claim of which he was ignorant before; and the courts have gone on to liberalize, in opposition to what is now proposed. It seems to me that the object of this scheme is to carry us back to the day of Sergeant Saunders, when the object was to conceal the defence and to catch the other party at a disadvantage. The courts have liberalized this defence for the very purpose of preventing that. Other cases have occurred in which the defendant himself had failed to disclose to his counsel a really good, substantial defence that was developed in the examination of the testimony of the plaintiff. The statute provides now that a further bill may be filed and a further defence made in that case. Without that bill, the courts have held that the defendant may file this substantial defence.

Now my friend says that these bills of particulars amount to nothing. How is that? The statute says that either party may call on the other, if the bill does not disclose the ground of defence, for a statement of particulars. My friend says that amounts to nothing. If that amounts to nothing, what will a special bill amount to when the same party has to make the special bill who now makes the specifications? I cannot conceive why all that is proposed and sought to be obtained by requiring the defendant to file a bill in writing instead of the general issue may not be better consummated by the statute as it now stands.

Marshall Hanger, of Staunton: Mr. President,—I move we adjourn.

J. R. Tucker: I will not delay the association long. I was going to say that it seemed to me that this question was too important to

be debated on further to-night. There are one or two remarks that I would like to make at any time that the association might desire to listen to them. If the association now adjourns, I would like to make them to-morrow morning.

The association then took a recess until 11 A. M. Wednesday, August 2d.

SECOND DAY.

WHITE SULPHUR SPRINGS, W. VA.,
Wednesday, August 2d, 1893.

The association was called to order at 11 o'clock A. M. by the President.

R. R. Prentis, of Suffolk: Mr. President,—The Committee on Admissions has held a meeting, and submits the following report.

Mr. Prentis then read the report of the committee.

(*See Report at end of the Minutes.*)

The President: The effect of this report is to make these gentlemen members, and will be adopted, unless there is objection. Gentlemen of the association, I now take pleasure in introducing to you Professor Charles A. Graves, who will read a paper on Extrinsic Evidence in Respect to Written Instruments.

Mr. Graves then read his paper.

(*See Appendix.*)

The President: Next in order is the report of the Committee to Recommend Officers.

S. S. Turner, of Warren: Mr. President,—I have been requested by that committee to present the following report:

The Committee to Recommend Officers for the ensuing year respectfully report as follows:

PRESIDENT: Waller R. Staples, of Montgomery.

VICE-PRESIDENTS: R. R. Henry, of Tazewell; James P. Harrison, of Danville; George McIntosh, of Norfolk; R. Walton Moore, of Fairfax, and John J. Williams, of Winchester.

MEMBERS OF THE EXECUTIVE COMMITTEE: William J. Leake, in place of R. L. Henley, whose term has expired; Eugene C. Massie, in place of C. V. Meredith, whose term has expired.

SECRETARY AND TREASURER: Jackson Guy, of Richmond.

DELEGATES TO THE AMERICAN BAR ASSOCIATION: Thomas H. Willcox, of Norfolk; Samuel Griffin, of Roanoke, and H. H. Downing, of Warren.

The President: The election of officers is now in order. The Constitution provides for their election by ballot, but I think that has sunk into "innocuous desuetude," and the custom is to move the adoption of the report of the committee.

On motion, the report was received and adopted, and the officers as named by the committee declared elected.

The President: I desire to state to the association that, as I understand the rule, there can be no vote on the report of the Special Committee on Law Reform until the entire report has been considered. The report will be considered by sections, and each section adopted as it is, or amended or rejected; and, after considering the whole report, the vote will be taken on it as a whole.

R. T. W. Duke, of Charlottesville: Mr. President,—I desire to make the motion that after two addresses, one in favor of the report and one against it, we then proceed to take up first Mr. Cochran's substitute and then the different sections of this report, and that the speeches be limited to five minutes each, and no member be permitted to speak more than twice.

The President: That is at present the law of the association, though it has never been enforced.

J. R. Tucker: Mr. President,—If I had not committed myself last night to saying something this morning on this report, with a diffidence which is not unusual with men at my time of life, I would have abstained from—I would really have been delighted to be excused from—saying anything in this debate at all; but it seems that, despite such reluctance, there is a duty imposed on me to say something on this important subject—a duty imposed upon me by the position which I assumed upon the question a year

ago, when I occupied the position which you do, sir, and when I announced myself entirely in favor with the great reform of procedure movement. To have refrained from saying something upon this occasion would have made it seem that I was not actuated by the maxim which does control me now, and which I trust will control this association—*nulla vestigia retrorsum.*

For several years this association has been considering this question; and at least two years ago, I think, when we met here last, the question was assuming a form in favor of action, which made it necessary for us all to look into it much more carefully than we had ever done before. In preparing my address as President of the association one year ago, I determined to look into this question for myself. I was afflicted, if I may say so, with that ultra conservatism which makes us hate to see anything change. And when I heard my excellent friend from Staunton (Mr. Cochran) say last night that the profession owed a debt we could never repay to Conway Robinson and John M. Patton, I remember that when I came to the bar all the old men said: "Was there ever such stuff!" Why, they didn't want to change a sentence, or cross a *t* or dot an *i* in the old Revised Code of 1819. Thirty years passed away and we had the revisal of 1849. Thirty-eight years passed away, and we put in the Code of 1887, and I say to my good friend from Staunton that the world does move, although certain mossbacks among us do not want to move at all.

Now, I take to myself a great deal of this mossback name. I believe in old things, and holding on to what is good; but I do not believe that we are to hold on to the old things so strongly that we never can change. The Code of 1849 was in advance of the Code of 1819. Do they say to-day that we have taken no advance since 1849, and that we must bind ourselves to the Code of 1849? And are we to see no more changes? The world is moving; jurisprudence is changing; forms of procedure are changing. When this question came up I feared greatly that we were going with New York, that we were moving in this direction, because they had, as I supposed, a very radical tendency; but when I saw the bench and bar of the mother country; when I thought of the illustrious men who are on that bench to-day;

when I saw they had consolidated the jurisprudence of law and equity, I said: "Why should we think that we cannot go as far as the English bench and bar have gone in the matter of procedure?" I became satisfied that we should take some steps in this matter upon review of the proceedings in England on this subject, as well as those in Massachusetts; the movement in Connecticut, as well as the movement in New York, which has never come to anything, because David Dudley Field's programme has not been adopted in that State, and it has just been left to the Legislature with nobody to give direction to their action, and, therefore, on this subject I do not desire to follow New York. But I have a desire to follow what is good in England and in Massachusetts, and in the other States. Therefore, I announced a year ago that a renaissance, which I felt with it, had come through old Virginia to move along with the march of jurisprudence in these other States and in the mother country.

Now, after the long discussion and consideration of a year ago, this association, by a vote of nearly two to one, voted for this resolution under which the committee has acted and reported. We have brought in our report, and now it is proposed to take steps backward—to say that all we have done is to be undone, and that the Bar of Virginia, in its solemn meeting, has declined to proceed; that the steps which we have taken have been all wrong, and that we will go back to the old place again and do not intend to move at all. Gentlemen, I do trust that this association will consider well before it declines to proceed, and say that what it did a year ago is to count for nothing and it is to stand still.

I say this for another reason. As certainly as we sit here the Legislature of Virginia is going to take this question up if the lawyers of Virginia say that they hang to the old forms of procedure. The public men of Virginia say the contrary; the young men of the bar say the contrary, and many of the old members of the bar say the contrary: "We are not going to hang on to the old methods of procedure."

I agree with the maxim *Festina lente*. I am not in favor of a radical reform. The committee has not reported a radical reform. We said that we found a constitutional objection in the way. We have reported, in certain respects, changes that we

thought should be made—changes that would not only simplify but would, more than all, clarify the rules of procedure.

In our pleading—not only in the declaration but in the plea, not only in the form of the declaration but in the form of the general issue—there is no notification of the ground on which the defence or prosecution depends, and the thing that we are to urge is that when a man has a case he is to state it, not as somebody long years ago said he must state it, but let the thing be put on record in such form that each man shall know what is the claim of the other party; and then they can come and fight the battle out in the open field and not in ambush. Our desire is that the same court in the same cause shall administer law and equity according to the right of the parties. Why should the same judge, in the morning, enter a solemn judgment at common law which he as solemnly enjoins in equity in the evening? Why take two bites at a cherry? What is the sense of it? If a man has a case which is a law case and an equity case let him put it all in the same bill and let the judge decide the matter upon law and equitable principles. We find that we cannot accomplish this under the provisions of the Constitution.

My very learned, and acute, and witty, and satirical friend from "Old Flu." (Mr. Pettit) made a great to-do of it when he was rubbing in his satire and sarcasm. I enjoyed it, because it came from a friendly and loving hand. I thank God for one thing, my brothers, that we may fight over law reform, but there will be no deformity in our association relations; we are brothers. Now, I liked that very much. I like a joke when I get it on my old Fluvanna friend—when I could excite his pronounced amazement, as you remember, down at Old Point last summer. I love a joke, and I relish a joke on myself when it is a good one. Ridicule may not be a test of truth always, but it is a very good test of good temper, and I think we have taken it in good part; and I am going to show a different disposition on my part. I am not going to say a sharp thing or a sulphuric thing about anybody in this connection.

Our friend—our venerable and splendid friend—the first President of this association, whose absence from this meeting the association so deeply regrets, that Nestor of the Virginia Bar,

William J. Robertson, made an address before us four years ago in which he spoke of cases that had occurred—not very frequent, but rather rare—in which men have lost their right because they have mistaken their remedy. Now, if we do this one thing; if we provide that a man shall never lose his right because his lawyer has mistaken his remedy; if we save the rights of a poor woman or of an infant child, this Bar Association will have done a good thing, and something to be proud of.

My friend from Fluvanna said last night that there was a great deal of tautology and a great deal of supererogation in this first bill proposed. Well, if it is tautological, I don't think a mossback ought to complain of that; but there are none of those supererogatory terms he speaks of. He says it doesn't amount to a great deal. Why, then, is he making such a fuss about it? I present to my friend this dilemma: we are either doing a great deal or a very little thing; it is either one thing or the other. The changes we propose in this first bill are very small. We propose that instead of bringing an action of debt, or assumpsit, or covenant upon a contract, that we bring the action on the contract, whether it is express or implied, sealed or not; and the young lawyer who does not know whether that scroll over there is a seal or not, will never have any difficulty about bringing his action on the contract. There can be no harm in that. "But what are you doing it for?" We are merely doing this to clear away difficulties that now exist in the way of pleading. That is the whole of this first section, and what objection can there be to it?

Now we come to the next section: "What is required to be stated in a bill?" Oh, my friend from Fluvanna! I must say one thing about him—that his hand looks like he had been eating persimmons when they were green! I did not know that he had been gathering the crop down in the State of Fluvanna before he came here! I get letters from him sometimes, and it is like a hand—another hand—that I know: it is a very bad hand, but I always like to get his or her letters. He says: "Save us from this writing!" My friend has a bill in chancery to write; would he abolish that because his hand is so bad? His argument is that. He says: "Don't make me write any plea; let me enter 'not guilty.'" But you have to write that. "Oh, no! the clerk does that." Yet still it has to be written out.

"But what do you want me to write out? What bill can I make up?" If I sue you, sir, for a bill of goods made out against you, and you plead non assumpsit, what does that mean? My friend, do you mean to say that you never got those goods? "I say non assumpsit." Well, you certainly got those goods; what do you mean? "Well, I mean non assumpsit." We know that you entered the plea of non assumpsit; but either say that you never received the goods, or that you have paid for them; which do you mean? What do you want to put me on proof of—that I actually sold you the goods? "Oh, no; I want to prove that I paid for them." Very well. The question then will be only that you paid for them. I sue an endorser on a bill of exchange in assumpsit, or in debt. He pleads non assumpsit, or *nil debet*. What do you mean—that you never endorsed that paper? Because, if you do, I will summon a number of witnesses to prove your handwriting. "Oh, *nil debet*." But tell it; what is your defence? Your defence may be that you didn't endorse at all, or that there was no protest of the paper, or that notice of the protest was not handed to you. What is your defence? Let me know what you are going to fight about.

Now, you will find that the new code of procedure in England requires the party who sues on a negotiable instrument to set forth the note sued on, and the party who defends the suit to give the exact form of defence as to the question of liability. I do not know how it is with an old lawyer, but when I was a young man I was always in trouble when a man put in the general issue; I did not know what witnesses to summon. This bill says that you shall say what is your real defence. What is the harm in that? My friend says: "Oh! save me from so much writing." But you will charge a fee in proportion to the amount of writing you do, and you will certainly not lose by it.

The next section concerns the form of demurrer. Suppose a party demurs and you ask him why he does so—what is your ground of demurrer? "Oh! we will demur." The judge says, as I have heard him say very often from the bench: "Gentlemen, please state your grounds." "O! we just demur." "Well, but what are your grounds?" "Well, you can find out." I know a judge who says: "If you do not state your grounds of demurrer

I will overrule you." Is that the way you do down in Fluvanna? You say anybody can find out what it is. You hand in a declaration with six or seven or eight counts, covering about twenty or thirty pages, and say to the court: "Just see if you can pick a flaw in that declaration, and if you can, sustain my demurrer." What a farce! The judge has the right to say that if you don't state the grounds of your demurrer I will overrule you. This bill says that a lawyer must state the ground of his demurrer, and all other possible grounds of demurrer except those so set out must be overruled. Why should it not be so?

To the next section there is no objection raised, and there is no need for discussion on that.

The next section treats of what defects are not to be regarded on demurrer. Now, all this in section 6 of the report of the committee is in the Code as it is now.

Now we come to the point upon which I am authorized by the committee to say that we throw up the sponge. There is nothing mean about us. When you hit us a fair blow we go to our corner, and come up again smiling. I have no objection to the judge summing up when requested by the party, as the section 7 now stands, but I have an objection to his summing up at all. I agree with what my friend said upon that subject, not upon the constitutional ground, because the provision that is found in the Federal Constitution is the same as that found in our Bill of Rights, and the Federal courts sum up in a way really distressing to the defendant on trial; so that jury trial is retained, although there is a power in the judge to sum up. But I agree with him because I am very jealous of the trial by jury. Yet, if the parties desire that the judge should sum up the law as applicable to the evidence, there is very little difference in that from the granting of instructions.

In the next section we came as near as we could to merging law and equity. We could not adopt the system in use in England and elsewhere, where law and equity are merged, but we have provided that the principles of law and equity shall be alike applicable, and the same relief shall be administered, so far as the nature of the proceeding will admit, but wherever the principles of law and equity conflict the principles of equity shall prevail.

Who objects to that? Who objects to the principles of equity prevailing over the principles of law when the two come in conflict? Let him answer now or else forever after hold his peace. Judges do it every day—that is what the courts of equity are here for. And why should not you administer the principles of law and the principles of equity in the same case! Why should you set a fellow to work trying his case at law for years and then say to him: "You must file a bill in equity." Or, he tries his case in equity, and then, perhaps, after years of delay he is told that his remedy is at law. But my friend says that is the case of the spotted calf! Yet there are a large number of very able lawyers who have differed among themselves as to the jurisdiction of a court of equity; and a great many men differ as to whether a case is a case for equity or whether there is a sufficient remedy at law; and lawyers have often differed with the courts on that question. It is in this class of cases that the young lawyer finds his greatest difficulty. But there will be no difficulty in his way if the court says to him when he has gone on the law side: "Your remedy is on the equity side, and I will turn you over to the equity side." This is done repeatedly whenever a case comes up from Louisiana. The pleadings there are according to the civil law procedure; and when a case comes up to the Supreme Court of the United States, the court has repeatedly decided a case brought in equity to be a law case, and has sent the suit down and made the party file his declaration. That is just all you are asked to do here, and what is the objection to it? What is the difficulty about it? Why, if it only did this—if it only enabled a man who had come into court with a law case, and had been thrown out on the law case, and had to file a new bill, with the risk of being stopped by the statute of limitations, or might lose the evidence he had taken in the other case; if it only enable him to carry on the other case without any difficulty about the statute of limitations, it would be a great blessing. Therefore the whole proceeding is that if a man has, through his counsel, unwisely brought a suit in equity which is really proper for the law side of the court, the court will say to him: Go to the law side and file a declaration. Hence, this section provides for nothing except convenience in the conduct of the business of the court.

Do you object to the section about trover and detinue?

Mr. Pettit: Yes, sir; very seriously.

Mr. Tucker: Then I will answer that objection by saying that I do not see why you should, if the Code of 1849 said that you might bring either trespass or trespass on the case wherever either one would lie. If that alteration could be made, I do not see why we should not make the same alteration in trover and detinue. That is the whole thing.

The point of the next bill is that you may plead the facts of the case without limitation, and that you shall state exactly the facts of the case on one side or the other.

In the matter of the last two bills here, bringing out some principles in reference to the right of entry and the action of ejectment, will the association allow me to make one single remark?

This report I shall sustain by my vote, as I do with my voice, and as I did by my signature. Not that I read everything in the report, but I know that the work was done by competent hands; and I think that friend said last night that he had given great labor to the work. When they sent it to me I signed the report, but did not sign the appendix. I signed the report, because it went as far as we thought we could get on account of this constitutional provision; and therefore I adopted the report of the committee with the exception of the appendix. I said that perhaps we ourselves would move to strike it out. Now, the Legislature will meet next winter, and will take up this question, whether we act or not. Let us give conservative direction to their action by adopting this report. If we recede now from the position we took last year, the Legislature will say that they will conduct this reform because the lawyers cannot effect it; and that the lawyers, having put their hands to the plow and looked back, are not fit for the kingdom. Now, for one, I am not willing to go away and let the country say: There is an association of learned lawyers who finally *came* to determine, in the year 1892, that they would reform their procedure, and went up, *trans montes currunt*, and said they would not do anything more. As for me, I am in favor of the reforms in this report.

On motion, the association then took a recess until 8.30 P. M.

EVENING SESSION.

Wednesday, August 2—8:30 P. M.

The association was called to order by the President.

Thomas H. Willcox, of Norfolk: Mr. President,—The association this morning paid me the compliment of appointing me one of the delegates to represent this body at the annual meeting of the American Bar Association. Since this morning I have ascertained that the date of that meeting is at a time that conflicts with my official engagements in the city of Norfolk. I therefore move that my name be taken from that committee and the name of Mr. R. S. Thomas substituted.

The resolution offered by Mr. Willcox was adopted.

W. A. Fentress: Mr. President,—If the chair will allow me to occupy the time of the association, I would like to state that it was my necessity to report to the association as a member of the Committee on Legal Education and Admission to the Bar that we had been unable to hold a meeting of that committee, and that no quorum was present, but that we hoped to have a quorum later. Up to this time, no other member of that committee has appeared, and there are only two members present. Speaking for myself as a member of that committee, I wish to say that I feel deeply sensible of the importance—for the sake of the dignity of the profession—of the work of that committee; and Mr. James L. Anderson, of Richmond, and I have held a conversation and conference on this subject, and Mr. Anderson has prepared a resolution for the consideration of the committee to be appointed at this meeting.

James L. Anderson, of Richmond: Mr. President,—I had a conference with Mr. Fentress in regard to this resolution which I propose to introduce. I did not wish to trespass on the duties of this committee, and therefore I had a conference with him before the introduction of it. At the first meeting of our association a resolution was referred to this committee instructing them to prepare a measure to come before the association, with a report in reference to legal education and admission to the bar. At the following meeting of the association the committee made a report, at which meeting Mr. Alfred P. Thom was chairman.

It reported a bill, which was adopted by the association, and they were instructed to present this bill to the Legislature. In 1890 this committee reported that they had presented this bill and it had failed to pass. Since then the matter seems to have dropped. I presume that most of the members are familiar with the terms of that bill, or the principal measures of it, and I do not like to consume time in reading it. The principal features are about these: That whenever an applicant desires to get a license to practice law the local court shall appoint a commission of not less than three members of the bar to examine him; and that that commission shall examine him in open court with the assistance of the court; and upon his appearing to be sufficiently qualified he shall be granted a license. I think that this is a very important measure; but this association knows as much about it as I do. I will offer the following resolution:

Resolved, That the Committee on Legal Education and Admission to the Bar be requested to present to the next meeting of the Legislature the bill which was reported to this association in 1889, or some similar bill, or such a modification thereof as said committee may deem advisable, and to urge its passage.

Now, if any member of the association desires this bill to be read I will read it. It was prepared by this committee after a great deal of care, and it chiefly follows the Maryland statute, though they cite extracts from different statutes. As it has already been adopted by the association once, I see no necessity of reading it.

R. G. H. Kean, of Lynchburg: Mr. President,—I rise for the purpose of striking out in that resolution everything in regard to the presentation of a different bill to the Legislature than the one we have adopted, or any modification of that bill, and let the proposition be to present that bill as adopted and passed by this body. If the committee is at liberty to abandon a bill that has stood the test first of modification in the committee and then in the association, there is no telling whether another proposition made by them to the Legislature would be acceptable to the Association or not; but in that bill we have a measure that did receive the practically unanimous approval of this body.

Mr. Anderson : I will accept the amendment. That clause was put there because I thought that if it were not possible to get the bill, as adopted, passed by the Legislature, the committee might get one as near it as possible. I will accept the amendment by having that stricken out, so that the resolution will read :

Resolved, That the Committee on Legal Education and Admission to the Bar be requested to present to the next meeting of the Legislature the bill which was reported to this association in 1889, and to urge its passage.

The resolution as amended was adopted.

(For Copy of this Bill see Appendix.)

The President : It gives me pleasure to present to the Association Mr. J. Allen Watts, of Roanoke, who will read a paper on "Duty of the Legal Profession in Regard to Needed Changes in Legislation."

Mr. Watts then read his paper.

(See Appendix.)

The President : We will now proceed to unfinished business, and that is the discussion of Law Reform, in which Mr. Cochran has the floor.

A. F. Robertson, of Staunton : Mr. President,—I move that we adjourn to to-morrow morning at 10 o'clock.

The Association then took a recess until 10 o'clock Thursday morning.

THIRD DAY.

WHITE SULPHUR SPRINGS, W. VA.,
Thursday, August 3, 1893.

The association was called to order by the President at 10 o'clock A. M.

The President : It has been suggested that instead of continuing the debate we change the order of the day to reading the resolutions on the deceased members of the association. Unless there is some objection the report of the Committee to Report Resolutions of Respect to the Deceased Members of the association is in order.

B. W. Lacy, Chairman of the Committee on Memorials on Deceased Members, presented the report of that committee; and, at the request of Judge Lacy, Mr. James Pleasants, a member of the committee, read the paper and resolutions on the death of Major Legh R. Page, saying:

Mr. Chairman,—When the news of the sad and distressingly sudden death of Major Page in the city of Chicago on June 8, 1893, reached the city of Richmond it caused the profoundest shock and sorrow among all the members of the bar in that city, and, indeed, through the whole community. The deep feeling of distress at once manifested itself in one of the largest meetings of the bar ever held in that city, for it was universally felt that our bar had lost one of its brightest ornaments. Upon that occasion I was appointed by Judge B. R. Wellford, Jr., who presided over the meeting, a member of the Committee on Resolutions, of which committee the accomplished and esteemed Judge William W. Crump was made chairman, and heard read in the committee-room, and afterwards before the meeting, the very admirable preamble and resolutions prepared by Judge Crump, and passed by the meeting, in honor of the memory of Major Page. I can add nothing to their strength and beauty, their warmth of feeling, fitness of tribute, just and appropriate praise, and grace of diction, or so well present a memorial of the distinguished and lamented Major Page—of his career, talents, accomplishments, virtues and achievements—as by reading these resolutions before this association, as I now ask to do, and, further, by asking that this body will adopt them as its own (such changes being made in them as to time and place as may appear suitable) and will cause them to be spread upon its records.

(*See Memorial at end of Minutes.*)

Judge J. K. M. Norton, another member of the committee, read those on the death of Captain A. D. Payne; Mr. A. C. Braxton, another member of the committee, those on the death of Judge John W. Stout; and Judge Lacy himself presented those on the death of Colonel W. W. Gordon.

The report of the committee was unanimously adopted.

(*See Memorials at the end of the Minutes.*)

J. R. Tucker: One of the misfortunes of this very pleasant meeting of the association is that we have been denied the pleasure that had been promised us of listening to the address of my old friend and comrade in public life, the distinguished citizen of Ohio, Hon. Frank H. Hurd. He was obliged to give up his promised visit and promised address on account of ill health; and it seemed to me, upon the suggestion of other members of the association, that some minute upon this subject would be appropriate and grateful to the gentleman who is confined at home. I offer this resolution:

Resolved, That the Virginia State Bar Association owes its acknowledgments to the Hon. Frank H. Hurd for his kind acceptance of its invitation to deliver the annual address before this body; and deeply regrets that ill health prevented him from complying with its invitation; and we tender to him the assurance of our high esteem for him as a statesman and as a distinguished member of our profession. And it is ordered that a copy of this minute be sent to Mr. Hurd.

On motion, this resolution was adopted.

The President: The order for this hour is the reading of a paper by Mr. Alfred P. Thom, of Norfolk, entitled: "The Inevitable Re-Adjustment of Law." I take great pleasure in introducing to you Mr. Thom.

Mr. Thom then read his paper.

(*See Appendix.*)

The President: Unless there is discussion on the paper just read the order is unfinished business, in which Mr. Cochran has the floor.

J. C. Parker: Mr. President,—I ask the indulgence of Mr. Cochran for one minute, believing that as soon as the unfinished business is disposed of it will be almost impossible to hold the association together. I suggest that we have a report from the only Standing Committee that has not reported—the Committee on Judiciary, and if there is no report I would like to offer a resolution, the consideration of which, I think, will take only a few minutes.

William B. Taliaferro: Well, sir, I have no report. I desire to say that we have been unable to get a quorum of the committee

at all. Five constitute a quorum, and we have been unable ever to get five together. The committee has never met, and, therefore, cannot report.

Mr. Parker: I can testify that General Taliaferro has done his best to get the committee together. One of the objects of the association is to promote needed changes in the judicial system of Virginia, and with this object in view I desire to offer the following resolution, which is a *fac simile* of the one I offered at the last session of the association:

Resolved, That a Special Committee of seven be appointed by the Chair, who shall inquire and report to this association, at its next meeting, whether any, and if any, what changes should be made in the present judicial system of Virginia.

Rosewell Page, of Richmond: Mr. President,—It seems to me that that proposition caused some continued debate last year, and might do so again. Therefore, as the other matter is up, I think that is the order of the day and ought to be taken up now.

Mr. Parker: I would like to say that my remarks were addressed to the Chair by consent. I want to bring the matter before the association before the question of law reform is disposed of. I offer this resolution now, and if there is any objection it will be laid upon the table until after the other matter is disposed of.

On motion, the resolution was laid on the table.

George M. Cochran, Jr.: Mr. President,—After the able paper we have heard read it is a difficult matter to take part in a running debate on the question before this body. I have listened with much interest to the gentlemen on the other side, and I have not changed my sentiments on account of anything they have been pleased to give us. I was much struck with the kindly spirit exhibited by my old friend, Mr. Tucker, but I must say that I thought he was a politician, rather than a lawyer, in the furtherance of his views.

You, Mr. President, in your argument, made use of the expression that there was a ground swell among the people in favor of this change. Gentlemen, there is not, in my judgment, an iota of truth in that opinion. The people know nothing about

it; and if ever the people are misled on this subject they will be misled by the lawyers. There is no demand for it whatever. For fifty years my old friend, Mr. Tucker, practiced under the old system, and never dreamed of any difficulty in it. He told us that in the last eighteen months a great light had burst upon him, and he found that he had been working all this time in the dark with the shackles upon him. His conversion was almost as sudden and miraculous as that of Saul of Tarsus, and it seems to me that the only difference is that it left my old friend blind.

I think that this association for the first time at this meeting has really taken hold of this question. There is no lawyer here who does not now recognize that this is a most important step, and the difficulties in the way are presenting themselves for the first time.

When I found that Mr. Tucker was in the dark, I said: What is the matter? and I set to work to inform myself. I studied the code of procedure as well as I knew how; and I think it would be a most vital step for us to throw away as good a system as we now have to adopt something that we know nothing about. I am not one of those who imagine that the line of progress lies in taking this step. I do not believe that the people are going to run over me. Mr. Tucker's great strength may carry very many unthinking people along with him; but, sir, I am satisfied that we have a system that is as good as any one need want. I offer my substitute as a substitute for that report and the outrageous bill in the appendix. I do not mean to say that our system can never be improved. We are substantially doing that now, and will do it in the future; but the point I make is that when we pass what they are now driving at—when we endorse this report—we endorse also this appendix bill. They say that all the twelve bills are directed to getting us down to this bill, and that the constitutional provision is the only thing in the way at this time. I do not believe that there is any constitutional trouble in the way. I believe that if the Bar Association adopts this report, the Legislature will pass that bill in the appendix. It is a constitutional bill if the Legislature chooses to pass it.

I am not one of those who believe that we have a perfect system; but why should we change our procedure? Is it too ex-

pensive, or is it too slow? I do not know what may be the experience of others, but I have been practicing in a circuit to which neither of these propositions can be attributed. I take it that our taxed costs on procedure are as light as in any State, and it is my opinion that in the question of costs there is as little to complain of as in any procedure on earth. The only other question is the one as to speed. I do not know any system under heaven that can be made any more expeditious than the one we now have. I have seen a suit brought in April, tried in May, and reviewed by the Court of Appeals in September. Can you get anything faster than that? You can only do it by shoving the courts closer to each other; you cannot do it by any system of procedure.

Of course, we know that lawyers practice all sorts of devices to delay matters; but I say to the bar that in my circuit you cannot do that. We have a judge who had rather try a jury case than eat a dinner. He makes us lose our dinners because he enjoys trying jury cases so much.

Now, if we get nothing cheaper, and nothing more expeditious, what are we going into this thing for? I do not believe there is a man here who, from his own personal knowledge, is prepared to speak on the procedure these gentlemen are trying to put us into. They say that our present system is more than forty years old; and Mr. Tucker's idea seems to be that the good work of Mr. Robinson and Mr. Patton has worn out with age. I think it has stood the test of time. We have made experiments with it, and amendments to it, and are prepared to go on all the time simplifying it. And in my experience, which has not been short, I have never known a man to lose his rights by any defect in our system of procedure, and I doubt if there is a man here who ever did. Various bills are presented here on that line. There is a bill swinging a man around from law to equity. I understand that they give that part up, yet it is in the bill. The idea is that a man may lose his case by going in at the wrong door. It strikes me that the bill presented here to guard against that might be greatly simplified by amending our statute of limitations, and the same object would be accomplished. Then let us amend our statute of limitations so that the time a man lost by going into the wrong forum should not count.

Now, in another bill of these gentlemen, where they propose to put detinue and trover upon the same footing, as trespass and case now are, I would substitute covenant and assumpsit; then, no man need fail by not knowing whether the instrument he sues upon is sealed or not sealed. You can bring trover in any action where detinue lies now; but it does not follow that wherever trover lies, detinue lies. This bill strikes me as strange, for in many cases where you can bring trover you cannot bring detinue. Detinue is the only action that gives you the thing itself instead of damages; they are of an entirely different character.

To some of these bills I do not think any one has any objection, but when you endorse this report you endorse that bill in the appendix. Are you ready for that? Now, I offer my bill as a substitute. The effect of it will be to place the two systems side by side. Time will tell whichever of them is the best, and the best will be adopted. No one will have to give up anything. The man that wants one action will have it, and the man that wants the present system has it. That ought to satisfy everybody, and it is certainly a better settlement of this question than the adoption of that report, and with it the appendix, would be.

I know that the text-writers do not agree that the code procedure reduces the amount of work. You must attend to details, or an inferior man may trip you up. Any man can learn the theory of procedure in a very short time—a day or two merely is sufficient; but, after you get the theory, you are about as far from being a practitioner as you were when you started. Maxwell says that few lawyers in the world can trust to the unaided head in forming such proceedings as will stand the test. There are more forms in his book than Mr. Minor has in his Institutes. I wish to call the attention of the members to the fact that they are not going into as easy a swim as they expected. How long do you think it will take you to learn how to use the code procedure so as to feel as certain of your foundations as you do now? We would be doing well to do it in three years. It will have to be amended and passed on by the court before any lawyer will feel any degree of certainty in the steps he takes; whereas now he knows where he stands.

I did not attend the meeting of that committee, and I am here now, as the minority man on that committee, to protest against the most outrageous measure that the lawyers of Virginia could put upon the tax-payers and suitors of this State. Adopt this bill, and try your chancery causes in open court, and how long will it take? As I told you, we have as good a judge as can be found. If he held court every day in the year he could not get around his circuit. Chancery causes are more important, as a rule, than suits at law, and greater pains is taken with them. If you were to have the witnesses in a divorce case in court, it would take a week's time to examine them. Does not that necessitate an increase of judges? I calculate that it would take three times the number of judges that we have now to do the same work, and that will be an increase of $50,000 a year to the tax-payers of the State. Then you must have an official stenographer for each court, for lawyers will want to preserve the evidence they take in chancery causes; and fifty stenographers at a salary of $1,000 each will be $50,000 more. The suitor that employs you will have to pay you more than he does now. The lawyer will get his fee for the increased work, but is it right to put the suitor in a position where he will have to pay this money? You are increasing the burden of the suitors, increasing the taxes of the land, and you are doing it all under the name of reform of the procedure.

R. M. Hughes: Mr. President,—I wish to say only a few words on the subject of the amendment offered by the gentleman from Staunton. I rise to support the report of the committee, and to recommend that the association pass the amendment over, because I am an advocate of the common law system. The difference, as it seems to me, between this amendment and the report of the committee as we are now considering it—and I do not consider that the appendix is in it—is simply this: that the committee, if they intend to limit us to this single form of action, have taken but one step towards it, while on the other hand, this amendment lands there at one jump. This practically abolishes all the distinctions between the forms of actions now existing, and makes all one single form of action. Verily, it seems to me it is the staff of Brutus!

Mr. Cochran: It is not that; it leaves the other system in force.

Mr. Hughes: I was going to say a word about that. It seems to me that that is a one-sided way to look at it. I do not see how it can be argued that because you leave the other actions theoretically in force, you ought to offer this. I have heard of a lady sometimes marrying a persistent suitor to get rid of him, but I never heard of applying that principle to legislation. We go to our medical friends to be vaccinated as a protection from small-pox, but I never heard of giving a man small-pox to protect him from vaccination. I believe in the common law system. Instead of tearing up everything by the roots and landing us in a sea of uncertainties, the committee have taken what we have and built upon it, and therefore I support the report against Mr. Cochran's substitute.

John Goode, of Bedford City: I do not rise, Mr. President, with a view of participating in this discussion. I have been an interested listener to what has been said. I knew nothing of the report when I came here until I heard it read and so ably discussed. Now, as our time is growing short, and I presume an intelligent body like this would be exceedingly reluctant to adjourn without having reached any practical result, it seems to me that there is a common ground of compromise upon which you gentlemen may stand. I do not agree with my friend, Mr. Hughes, that there is nothing in this report that would commit this body to the single form of action in the future. I think the report points clearly to that in the future; but it appears that the authors of the report are not wedded to that scheme. It is proper to exhibit here a spirit of compromise. On the other hand, my friend from Staunton (Mr. Cochran) while unalterably opposed to the adoption of the report, also evidences a spirit of compromise. I am willing to join hands with you, gentlemen, and adopt some, if not all, of your report. Withdraw all that part of the report relating to the appendix, and let us take the vote on these bills, which I say I am prepared to support in the main.

Rosewell Page, of Richmond: Mr. President,—I do not suppose that anything I can say will change the views of any one here, but I rise to state the reasons which prompt me to support the report. I speak with all deference, and I may say with affection,

for the learned opponent of this measure. The men who have brought in this report are actual professors of our profession, and they have come before us and state that they made it upon full, complete and thorough examination of the procedure of the English-speaking world. Now, sir, I am like my learned friend there from Staunton ; I do not profess to say that I understand the whole of this report, or know in detail what its changes are ; but these learned students of the law—these law writers—come and say that we are not being launched upon a whole ocean of difficulties, without compass or rudder, but that the way is plain before us ; and, therefore, I shall support the report.

John Goode : I move to strike out from the report of this Committee on Law Reform all that relates to the general scheme for the reform in the procedure in our courts which is embodied in the bill called the appendix.

R. L. Parrish, of Covington : I desire to offer an amendment to the report by moving to strike out all that appears on page 15, so as not to commit us in any way to the proposition of consolidating law and equity.

S. V. Southal, of Charlottesville : I want to know about striking out the appendix—does it mean that the association disapproves of the appendix, or merely refrains at the present from acting on the appendix?

J. R. Tucker : It seems to me that the motion to strike out does not commit anybody to any reasons why he is not in favor of it ; and whether we approve of it or not we are willing to strike it out. I don't think it commits us one way or the other.

Mr. Goode : I offer the following resolution :

Resolved, That the association strike out all of that portion of the report of the Special Committee on Law Reform on pages 3, 4, 5, and 6 except the last line on page 6, and that it also strike out all of said report on page 15, and also the appendix to said report.

The resolution of Mr. Goode was adopted.

S. S. P. Patteson : I wish to offer the following amendment to the report of the committee :

Resolved, That the report of the Special Committee on Law Reform be amended by striking out proposition VII., entitled "A bill to regulate proceedings in jury trials in civil cases."

Adopted.

W. R. Meredith, of Richmond: I suggest that we take up the bills in numerical order.

The President: That hardly needs a vote; it is the order in which the bills will naturally be taken up.

Mr. Parrish: I desire to offer an amendment to bill No. 1, as follows:

At the end of the sentence in the sixth line, substitute a comma for the period and add the following words—to wit: "Or, if the contract be in writing, it shall be sufficient to file the same, or a copy thereof, with the declaration."

Mr. Patteson: We will accept that amendment.

The amendment of Mr. Parrish was adopted.

R. W. Winborne, of Buena Vista: I offer the following amendment:

Resolved, That bill No. 1 be amended by adding after the word "contract," in line 5, the words "express or implied," and by striking out, in line 6, the word "contract," and inserting in lieu thereof the words "cause of action."

Mr. Tucker: The committee are willing to accept that.

Mr. Winborne's amendment was adopted.

Mr. Parrish: I desire to offer an amendment to bill No. 2.

After the word "brought," in the second line, insert the following words, to wit: "Except actions to recover land or the possession thereof."

After the word "plea," last appearing in the fourth line, insert the following words, to wit: "In any action affected by this section."

After the word "pleas," in the seventh line, on page 8, insert the following words, to wit: "Upon such equitable terms as the trial court may prescribe."

Mr. Patteson: We accept that.

A. P. Thom: I must confess that I don't like committing myself to any recommendation to the Legislature in this hurried manner. I do not think that we are giving proper attention to these varied

amendments, and many of us don't know exactly what they are. I move, therefore, that the further consideration of this matter be deferred to the next meeting of this association.

Mr. Tucker: If that motion is debatable, I would like to say that the association must remember that postponement until the next session of the association of the consideration of this matter will postpone action on it in the Legislature for two years from next winter; and therefore I look on the motion as a motion in the interest of the defeat of the scheme, and I hope we will take no step like that.

Mr. Thom: That will be to postpone it for two years, but I think that is desirable rather than to commit ourselves to recommending any scheme to the Legislature in this way.

The motion to defer consideration was lost.

W. R. Meredith, of Richmond: I move to strike out clause II.

Mr. Pettit: I second that motion. That section is scarcely an amendment to any section of the Code. The committee itself says it is a new section. Every member of this association who has been engaged in practice for even five years knows that nine-tenths of the cases that are tried in our courts are tried upon the pleas of the general issue. It is very rarely the case in practice that there is any occasion to resort to any other plea than that known as the general issue. Shall we strike out a plea that serves every legitimate purpose that any one can demand, and has served it in our past? What objection is there to indicating to counsel by the plea of not guilty in action of trespass or case, that we deny the plaintiff's complaint? Why impose upon counsel the necessity of writing out pleas, the effect of which are so generally understood by every member of the bar, when we all know that it involves considerable writing and delay in the case, and imposes upon counsel labors that are certainly unnecessary for the accomplishment of any good? Now they say that no special form shall be required in any plea save pleas in abatement. That is the law now. Then the bill says: "Every plea shall be in writing, and shall state concisely the real defence relied on." That is substantially the law now; every plea is required to be in writing. All of this assumes that we are ignorant

of the law as it now is. I say that is a reflection on this association.

Mr. Tucker: We mean no reflection on our friend. What we mean to say is that when a man relies on a particular defence, he shall state it.

The President: The question is upon the motion of Mr. Meredith to strike out clause II. Gentlemen, are you ready for the question?

The question being called for, the motion was put to vote and carried.

The President: Motions in regard to clause III. are now in order.

John B. Donovan, of Mathews: I offer the following resolution:

Resolved, That the following words be stricken out of clause III: "The form of demurrer or joinder in demurrer may be as follows: The defendant (or plaintiff) says that the declaration (or other pleading) is not (or is) sufficient in law."

Mr. Parrish: I propose to amend by adding to the bill the following words: "But either party may amend his demurrer by stating additional grounds or otherwise at any time before the trial."

The amendment of Mr. Parrish was adopted.

Mr. Donovan: The bill proposed says that the form of demurrer may be that the declaration is not sufficient in law. That is our present law on the subject. That does not state the specific grounds of the demurrer, but if we strike out the portion that I have moved we should strike out, I think we will arrive at what the committee intended.

J. H. H. Figgatt: I offer to amend, as a substitute to his amendment, that instead of striking out anything, we add the word "because," so that the form for demurrer will read "the defendant (or plaintiff) says that the declaration (or other pleading) is not (or is) sufficient in law because," &c.

R. B. Davis, of Petersburg: Mr. President,—I would like to move as a substitute that we strike out the whole section.

W. R. Meredith : I move to strike out in bill III. the following words : "And no grounds shall be considered other than those so stated."

Rosewell Page : I am opposed to anything being stricken out, because it takes away from the object of that proposition, which is not to allow a man to go to the appellate court without stating the ground of his demurrer in the lower court.

The vote was then taken on Mr. Donovan's amendment, which was declared lost.

Mr. Meredith : Suppose that the court finds that there is want of jurisdiction without the assistance of counsel ; and with that staring it in the face I doubt whether the court could dismiss the case. I don't think we should force the court to dismiss the case on its own motion.

B. B. Munford, of Richmond : Mr. Parrish's amendment provides that if either counsel or court discovers proper ground of demurrer, he may insert that in the demurrer. Under Mr. Meredith's amendment, counsel would be careful not to disclose the real ground and in the Supreme Court bring forward a new ground, and might reverse the lower court. So I think Mr. Meredith's amendment ought to be voted down.

Willis B. Smith, of Richmond : You are tying the hands of the court where the counsel are ignorant. You are saying that the court shall not do anything on its own motion.

Vote was then taken on Mr. Meredith's amendment, which was declared lost.

The President : The motion of Mr. Davis is now in order.

Mr. Pettit : My objection to this amendment is general. It is that in many cases, and where there are any intricacies disclosed, it will be very difficult for counsel, in the hurry of trial, to put in a succinct and clear statement of all the grounds of demurrer he relies on. Let him put in a general demurrer. According to my observation, I have never known counsel who had good grounds for demurrer, to fail to disclose them fully to the court. If counsel have good grounds of demurrer, they are certain to state them to the court. Perhaps in criminal cases, where counsel think

they are entitled to avail themselves of every possible sort of technicality, they will not disclose their grounds of demurrer; but in civil cases counsel always disclose before the trial court every possible ground of demurrer. Now, is the court to be concluded because the counsel failed to state in writing any ground of demurrer—not only the court below, but the court above?

The vote was taken on Mr. Davis's motion, which was not adopted.

The President: Clause IV., the next in order, is to repeal section 3267 of the Code. Is there any amendment offered to that clause? If not we will proceed to clause V. No amendment being offered to clause V., it is considered as adopted. The matter now before the house is the consideration of the sixth clause. As no amendments are proposed to this, it is considered as adopted. The seventh clause having been withdrawn, the matter before the house is the eighth clause.

J. K. M. Norton, of Alexandria: I move that the clause be stricken out.

Mr. Patteson: I offer the following resolution:

Resolved, That section 2 of bill VIII. be amended by striking out after the word "shall" in line three to the close of the sentence, and inserting "cause a jury to be empaneled, frame an issue to be tried by them, and give to their verdict the same force and effect as if the same had been brought at law;" and by striking out the last four lines, and inserting: "The suit shall not for that reason be dismissed, but leave shall be given to make such amendments as may be necessary to afford proper relief; and the court, without the aid of a jury, shall administer such relief as the parties ought to be entitled to if the same had been brought in equity."

Judge Norton: I move to lay the amendment on the table.

The motion to lay on the table was lost.

The resolution offered by Mr. Patteson was adopted, and the motion to strike out made by Judge Norton was lost.

The President: The next in order is section IX. Is there any objection to that?

Mr. Cochran: I move to amend this section by inserting "covenant and assumpsit" in the place of "detinue and trover."

The President: I am obliged to rule this motion out of order. It is not germane to the proposition. The first clause provides for covenant and assumpsit, and makes another disposition for them.

Mr. Parrish: I move to strike out that section. I do not think that the fact will be called into question that the actions of trover and detinue are distinct. We have a statute now under which a man who has a cause of action in detinue, by giving a bond may have the sheriff take charge of the property. The judgment is different in the action of trover, and it seems to me that there will be confusion if the two are put on the same footing, and I therefore move to strike out the section.

The motion of Mr. Parrish was adopted.

The President: Discussion of section X. is now in order.

Mr. Patteson: I offer the following amendment:

Resolved, That the report of the Special Committee on Law Reform be amended by striking out the last sentence of proposition X., which reads as follows: "There shall be no pleading subsequent to the replication," and by causing the sentence before the last of the same proposition to read as follows: "But when the plaintiff relies upon new matter in answer to the plea, he shall state the same specially in his replication in plain and certain language, and the defendant shall do the same when he relies upon new matter in answer to the new matter thus alleged by the plaintiff, and no evidence shall be received of any new matter which is not so stated."

Mr. Patteson's amendment was adopted.

Mr. Meredith: I move to strike out the section.

The motion to strike out was lost.

Mr. Parrish: Mr. President,—I move now to strike out clauses XI. and XII. We have practically stricken them out by the amendments adopted to the original bill.

The motion to strike out XI. and XII. was adopted.

Judge Norton: I offer the following resolution:

To all pleas, except as to general issue, affidavit must be made by the defendant or his counsel or agent that the defence is believed to be true and not for the purpose of delay.

Mr. Pettit: I hope the association will not pass such a bill as that.

On motion, this resolution was laid on the table.

Mr. Cochran: Mr. President,—I desire to say that I have accomplished everything by my resolution that I wished, and I now withdraw it.

The President: I am requested by Mr. Tucker to read this resolution:

Resolved, That the bills recommended by the Special Committee on Law Reform, as amended, be approved, and that the president of the association appoint a committee of three to present to and urge upon the General Assembly of Virginia the enactment into laws of the bill proposed in said report, but with power in said committee to make such changes in the phraseology of said bill as may be deemed expedient, provided the substance of the same is preserved.

This resolution was adopted.

The President: I appoint on that committee Beverly B. Munford, S. S. P. Patteson, and R. L. Parrish.

(*See Report, as amended and adopted, at the end of the Minutes.*)

H. St. George Tucker, of Staunton: Mr. President,—I offer the following resolution:

Resolved, That the Virginia State Bar Association has witnessed with the deepest pride and profoundest satisfaction the exalted position won by the Hon. James C. Carter, of New York, an honorary member of this association, as counsel for the United States before the international tribunal sitting at the city of Paris to determine the Bering Sea controversy, and we tender him our hearty congratulations upon the additional laurels won by him in foreign fields before this exalted tribunal.

Resolved further, That the Secretary of this association is hereby directed to transmit a copy of this resolution to the Hon. James C. Carter.

The resolution offered by Mr. H. St. George Tucker was adopted.

The association, on motion, then adjourned *sine die*.

JACKSON GUY,
Secretary.

ANNUAL REPORTS.

1893.

REPORT OF TREASURER.

To the Virginia State Bar Association:

As required by the By-Laws of your association, the undersigned makes the following report for the year ending June 30, 1893:

I. *Receipts and Disbursements.*

As will appear from the accounts returned herewith (which have been examined and certified by the Auditing Committee) the total receipts for the current year have been $2,238.22, as follows:

Admission fees from 35 members at $5 each,	$ 175 00
334 Annual dues from members at $5 each	1,670 00
Sale of Reports,	7 21
Add balance on hand per last report,	386 01
Total receipts as above,	$2,238 22
And the total expenditures have been,	1,871 41
Leaving in the treasury a balance of	$ 366 81

The expenditures are classified as follows:

Annual dinner and other expenses at Hygeia Hotel, July 14, 1892.	888 35
Stenographer at Hygeia Hotel,	75 00
Salary of Secretary and Treasurer,	300 00
Printing, wrapping and mailing reports of Fourth Annual Meeting, and extra copies of addresses and papers,	440 32
Printing report of Special Committee on Law Reform and postage on same,	79 88
Incidental expenses, postage, forms, stationery, &c., &c.	87 86
Total expenditures as above,	$1,871 41

II. *Outstanding Obligations.*

There are at present no outstanding obligations of the association.

III. *Resources and Probable Expenses.*

The resources of the association for the coming year are estimated at $2,526.81, as follows:

Balance now in the treasury, ...	$ 366 81
Annual dues from 432 members at $5 each, . .	2,160 00
Total estimated resources, as above, . . .	$2,526 81

The probable expenses of the association for the coming year are estimated at $1,865, as follows:

Salary of Secretary and Treasurer, ...	$ 300 00
Stenographer at this meeting, ...	75 00
Annual dinner at this meeting, ...	900 00
Printing and distributing report of proceedings at this meeting, ...	440 00
Incidental expenses, ...	150 00
Total estimated expenses, as above, . . .	$1,865 00

It is my duty to add that the annual dues for the current year, beginning July 1, 1893, are payable, and should be paid at this meeting.

Respectfully submitted,

JACKSON GUY, *Treasurer.*

Richmond, Va., June 30, 1893.

Examined and approved:

G. M. COCHRAN,
J. R. V. DANIEL,
G. HATTON,
} Auditing Committee.

White Sulphur Springs, W. Va., August 1, 1893.

ACCOUNTS OF THE TREASURER.

DR. THE VIRGINIA STATE BAR ASSOCIATION,
In account with JACKSON GUY, *Treasurer.* CR.

1892.			
July 6.	To cash paid S. B. Brady for printing 500 dues receipts,		$ 2 00
8.	For postage.		1 00
15.	F. N. Pike, manager, annual dinner . . .		888 35
	Tips to waiters in connection therewith (by order of the Executive Committee),		12 50
	Telegram to Virginia Press Association, Portsmouth.		53
	Paper, &c., for use at annual meeting . .		50
	Board bill Hon. D. B. Lucas, orator, &c.,		10 75
	John G. Winston, stenographer, expenses and fee for reporting proceedings. . .		75 00
19.	Pos'age		6·00
28.	T. E. Marshall, addressing, &c., envelopes,		1 00
29.	Postage.		2 75
30.	S. B. Brady, bill for printing.		12 50
Aug. 6.	J. W. Fishburne, Secretary Committee on Admissions, admission fee F. S. Blair returned		5 00
Sep. 7.	Postage on reports, &c.		39 66
8.	Everett Waddey Co., printing, &c		397 66
	Express on packages, per cash-book . . .		3 00
30.	Salary Secretary and Treas. (1st quarter)		75 00
Nov. 14.	Postage		5 58
15.	S. B. Brady, bill for printing.		2 00
Dec. 31.	Salary Secretary and Treas. (2d quarter),		75 00
1893.			
Jan. 18.	S. B. Brady, bill for printing.		3 50
	Postage.		3 00
30.	A. E. Chalmers, N. P., affidavit, &c. . . .		50
Mar. 31.	Salary Secretary and Treas. (3d quarter),		75 00
May 5.	Postage.		1 00
26.	S. B. Brady, bill for printing.		11 75
29.	Postage on Report of Special Committee on Law Reform.		8 78
June 5.	S. B. Brady, bill for printing.		4 00
	Postage.		2 00
30.	Everett Waddey Co., bill for printing . .		71 10
	Salary Secretary and Treas. (4th quarter),		75 00
	Amount to balance		366 81
1892.			
July 1.	By balance on hand per last report	$ 386 01	
	By thirty-five admission fees at $5.	175 00	
	By 334 annual dues at $5	1,670 00	
	By sales of reports.	7 21	
		$2,238 22	$2,238 22
1893.			
July 1.	By balance in hands of Treasurer.		366 81

Examined and approved:

G. M. COCHRAN,
J. R. V. DANIEL, } Auditing Committee.
G. HATTON,

White Sulphur Springs, W. Va., August 1, 1893.

REPORT OF THE EXECUTIVE COMMITTEE.

To the Virginia State Bar Association :

In accordance with By-Law XII., clause 5, your committee submit the following report:

Under requirement of By-Law XVI., clause 2, the names of twenty of your members have been dropped from the roll for non-payment of dues. The large number of those so dropped this year is accounted for by the fact that the penalty for such delinquency has never been enforced before, so that, in many cases, default in payment has existed as long as three or four years. Your committee, while extremely unwilling to withdraw the benefits of the association from any one on this ground, yet deemed it unfair to the rest of the association longer to indulge members who thus seemed to evince a settled purpose to disregard their obligations of membership, while they continued to enjoy its privileges. The Executive Committee has the power, "upon the written application" of the member so dropped, "satisfactorily explaining such default, and upon the payment of all dues to the date thereof," to remit this penalty and reinstate such member; and of this all dropped will be duly notified.

Since your last meeting the hand of death has been busy amongst us: Col. W. W. Gordon, Major Legh R. Page, Judge John W. Stout and Capt. Alexander D. Payne, four of your ablest, most honored and most beloved, have left us, and gone "over to join the great majority." They occupied the very front rank of your profession and were among the most honored of your members. Fitting memorials of each should be adopted by you, to be printed and preserved permanently in your records.

Your committee had the good fortune to secure the consent of the Hon. Frank H. Hurd, of Ohio, to deliver the annual address at this meeting, and until a very recent date, he expected to be with us, but ill health, so serious in its nature as to require absolute rest from all work, mental and physical, has prevented his attendance.

The repast, intellectual and other, prepared for your delectation during this meeting, is exhibited in the programme in your hands.

Respectfully submitted,

F. H. McGUIRE,
Chairman.

REPORT OF THE COMMITTEE ON ADMISSIONS.

To the Virginia State Bar Association:

The Committee on Admissions beg leave to submit the following report:

At a meeting held at the White Sulphur Springs August 1, 1893, the following named gentlemen were duly elected members of the association, viz.:

Thomas J. Kirkpatrick, of Lynchburg; William Wallis and Joseph L. Kelly, of Big Stone Gap; Martin Williams, of Bland Courthouse; J. P. Whitacre and W. Roy Stephenson, of Winchester; J. R. A. Hobson, of Lexington; Graham Clayton, of Bedford City; E. H. Jackson, of Front Royal; Raleigh C. Crumpler, of Suffolk; Joseph E. Willard, of Fairfax Courthouse; Paul Pettit, of Palmyra; Thomas J. Randolph, of Norfolk; James S. Browning, of Tazewell; Lyman Chalkley, of Covington; J. A. Alexander, of Staunton; William Brydon Tennant and M. M. Martin, of Richmond; Charles T. Lassiter, of Petersburg; D. Jenifer Barton and William F. Wickham, of Richmond,

And on August 2, 1893, the following named gentlemen were duly elected members:

J. E. Yonge, of Roanoke; F. S. Blair, of Wytheville; David E. Moore, of Lexington; John T. Delaney, of Covington; and on August 3, 1893, E. J. Brugh, of Fincastle, Va., was elected a member.

Respectfully submitted,

ALEXANDER F. ROBERTSON, *Secretary.* ROBERT R. PRENTIS, *Chairman.*

August 3, 1893.

REPORT OF THE COMMITTEE ON LIBRARY AND LEGAL LITERATURE.

To the Virginia State Bar Association:

The Committee on Library and Legal Literature begs leave to submit the following report:

The late legal publications are of the same general character that has marked the modern law factories.

In statute law, another volume of Acts of Assembly has been given the profession. It is of the usual bulk and contains the usual table of errata. It is noteworthy that the system of dividing the Acts into public and private acts, with the double-barreled index thereby entailed, has been abandoned.

It is hardly within the purview of this report to review the changes in the law made by the last General Assembly, and, as the published acts have been in the hands of the profession for some time, it would be superfluous. But it may be worth while to call attention to the fact that this volume of Acts amends ninety-five sections of the Code; and even that number is exclusive of the numerous acts which amend it in effect, though not in terms. Classic history informs us that when Solon prepared his Code of Laws for Athens, he made the people promise not to change them during his absence from the city, and then went into voluntary exile. We are far from wishing such a fate to our revisors, and yet, if, in addition to the other great obligations under which they have laid us, they could have evolved some such scheme to prevent any tinkering at the Code which they gave us, our obligations to them would have been greatly multiplied. It would seem that a cautious spirit of conservatism should discourage any change in a code of laws unless there is a pressing necessity for it. The slight advantage which even those amendments that are real improvements may give, is counterbalanced by the consideration that the law should be as accessible as possible to the people who are presumed to know it.

The aversion to the full stop, characteristic of the average legislator, still appears in the statutes. Why is it that an act cannot be written in simple language and plain style? Why should it be necessary to crowd everything into one long sentence, with its attendant involved constructions and numerous provisos? Half the ambiguity in our written law would disappear if the draughtsman would confine himself to short sentences and be lavish with his periods. Full stops in a statute are like shade trees along a hot and dusty road. When plentiful enough to be always in view, they are a goal to strive for; they invite a pause. The weary traveler perforce rests when he attains them, reviews the portion of his task which lies behind him, and grapples the unfinished part with renewed vigor. Every "whereas" and "provided" in the dictionary is not worth a font of full stops.

This is said with the hope that it may be productive of some good in future, and not in a spirit of criticism. Our statutes, while susceptible of much improvement, are at least as well drawn as the Federal statutes. The latter are not only equally involved in phraseology and construction, but one of the most important of recent years was so badly drawn as to contain misspelt words and ungrammatical sentences. Our State statutes have never descended so low as this, and when we urge our legislators to exercise greater care in style and diction, and our public printer to spare mistakes in press work and to make better indexes, we do so from a pardonable ambition—we do so from the desire to see our State publications models of clearness and accuracy.

In Federal statute law, we have had a new edition of the Supplement of the Revised Statutes, which includes all general acts from January 6, 1874, to March 3, 1891; and, in addition, Volume 27 of the United States Statutes at Large has lately appeared, containing all acts of the last Congress.

As this publication has just been issued, it may be of some advantage to notice a few of its acts of a general nature touching on questions of a legal character.

On page 7 is an act authorizing the depositions and testimony of witnesses in the Federal courts to be taken as provided by the law of the State in which they sit.

Chapter 63, page 27, marks a new departure in allowing an American registry in certain cases to foreign-built steamers.

Chapter 209, page 252, contains an exceedingly important statute providing for suits *in forma pauperis* in the Federal courts, and requiring the officers of the court to render their services without requiring their fees to be paid or secured—a veritable novelty for those courts.

Chapter 360, page 354, changes materially the method of appointing receivers of national banks—apparently a very timely statute.

Chapter 83, page 443, compels witnesses to testify before the Interstate Commerce Commission even though they criminate themselves, but exempts them from prosecution in such event.

Chapter 105, page 445, materially restricts the stipulations in bills of lading, but limits the liability of owners of vessels for many accidents which rendered them liable at common law.

Chapter 196, page 531, requires railroads engaged in interstate commerce to adopt automatic couplers by January 1, 1898, but empowers the Interstate Commerce Commission to extend this period on good cause shown.

Chapter 202, page 557, supplies a defect in the rules of navigation by authorizing the Board of Supervising Inspectors to prescribe lights for barges and canal boats, for which no provision has heretofore been made.

Chapter 225, page 751, provides how and where property decreed to be sold by the Federal courts shall be advertised and sold.

The usual deluge of reports shows no signs of abatement. St. Paul still dispenses its drab and purple pestilences, while ten Federal appellate courts, about sixty district judges and twenty circuit judges, and fifty State and Territorial courts conspire to swell the volume which threatens to engulf us. A publishing house lately boasted of having sent out an entire car-load of law books, whilst the profession stood aghast at the thought.

If this state of affairs continues, what shall we do?

Passing from reports, the crop of text-books is also as abundant as usual. But the modern text-book is a misnomer, for they

have ceased to be written. They have degenerated into mere digests, and the best recommendation which their publishers think they can give them is to state in their circulars the many thousand cases which the text-books cite. The searcher after knowledge is doomed to many disappointments when he looks between their covers. Having first decided upon the heading of the index least likely to contain the subject on which he is seeking light, and found it there, he turns to the text, and is rewarded by finding the law stated just as the exigencies of his case demand. But his joy is short-lived, for he reads a few lines further and finds a "however," followed by a statement that many respectable courts have held the other way, or he makes a peculiarly apposite quotation from the text only to find that it is torn to pieces by an inconsistent foot-note.

We may well be thankful when text-books cease to be digests and become treatises, citing a few leading cases, instead of a mass of contradictory decisions. Such books will not need a new edition every year or two. They will lead the courts instead of following them.

There is some ground for hope that the reaction in favor of the treatise as against the digest is already commencing. Mr. Buswell, in his recent admirable work on "Personal Injuries," has set a good example in producing a treatise, which, while it may not always command our assent, still impresses us with its force; and our distinguished President, while possibly approaching dangerously near to the province of the digester in some instances, has yet enriched the legal literature of the State and earned the gratitude of the profession by giving us, in the new edition of his law practice, a work which at least has opinions of its own.

Respectfully submitted,

ROBERT M. HUGHES,
R. G. H. KEAN,
R. T. W. DUKE, Jr.

REPORT OF THE SPECIAL COMMITTEE TO ERECT A TABLET TO THE MEMORY OF CHANCELLOR WYTHE.

To the Virginia State Bar Association:

Your committee, who were charged at the last meeting of the association with the duty of erecting, "either in the court-room of the Chancery Court for the city of Richmond, in the new court-room to be erected in the city of Richmond for the Court

of Appeals, or in the chapel of William and Mary College, a mural tablet, with a suitable inscription, to the memory of Chancellor George Wythe," submit the following report:

After much consideration, the committee decided that the most appropriate place for the erection of this memorial was the chapel of the College of William and Mary. There were special reasons which, in the judgment of the committee, rendered this a peculiarly fitting place. Either of the other places would have emphasized simply his judicial career. But if the committee understood the sentiment of the association aright, it was not simply George Wythe the jurist, but George Wythe the lawyer, who was to be honored. In addition, this chapel commemorates his services as a legal instructor, which were a prominent portion of the work of his life. While a practitioner of law, he was the teacher of Jefferson, and in 1780, when the College of William and Mary was reörganized by Jefferson and made a university by the establishment of professional chairs, George Wythe was elected the first Professor of Law. This was the first professorship of law in any American institution of learning, and the second in the English-speaking world. Only the Vinerian, at Oxford, filled by Sir William Blackstone, antedates it, and the committee felt it especially incumbent upon them to link together the names of Blackstone and Wythe as the first great expounders of the common law. The fact that Wythe was also an alumnus of William and Mary, that the most stirring scenes of his life were passed in Williamsburg, before and during the Revolutionary War, and that even a considerable portion of his judicial career was also passed there, left no room for hesitation.

They therefore placed in the chapel a bronze tablet with the following inscription:

GEORGE WYTHE, LL. D.:
MEMBER OF THE CONTINENTAL CONGRESS,
SIGNER OF THE DECLARATION OF INDEPENDENCE,
MEMBER OF THE COMMITTEE OF 1779 ON REVISION OF THE LAWS OF VIRGINIA,
JUDGE OF THE CHANCERY COURT.

FIRST PROFESSOR OF LAW IN THE COLLEGE OF WILLIAM AND MARY.

The American Aristides, he was the Exemplar of all that is Noble and Elevating in the Profession of Law.

A. D. 1893.
This Tablet is Erected by the
VIRGINIA STATE BAR ASSOCIATION,
In Tribute to
His Courage as a Patriot,
His Ability as an Instructor,
His Uprightness as a Lawyer,
His Purity as a Judge.

The committee must express their appreciation of the courtesy shown by the Faculty of the College, who not only gave their consent, but extended many facilities which lightened the labors of the committee.

Owing to the promptness of Mr. R. Geissler, the maker of the tablet, it was finished and in place in time for the final exercises of the college. Those exercises were the bi-centennial of the foundation of William and Mary, and the attendance upon them was unusually large. The tablet was formally turned over to the college authorities, in the name of the association, by one of the members of the committee, and was much admired by those who were in attendance, and the Board of Visitors of the college adopted resolutions in acknowledgment of the gift, as appears by a copy of the same appended to this report. The committee beg leave to add, in conclusion, that the cost of the tablet was within the appropriation made by the association at its last meeting.

Respectfully submitted, R. G. H. KEAN,
ROBERT M. HUGHES.

At a meeting of the Board of Visitors of William and Mary College, held at Williamsburg on the 20th day of June, 1893, the following resolutions were adopted on the motion of Colonel Lamb:

"It having come to the knowledge of this board that the Virginia State Bar Association has erected a handsome mural tablet in the chapel in honor of George Wythe, its first professor of law, and one of its most distinguished alumni;

"*Resolved*, 1st. That the thanks of this board are due and are hereby tendered to the Virginia State Bar Association for their tasteful gift.

"2d. That the board feels specially gratified that the name of George Wythe, so eminent as a lawyer and a judge, has at last been honored by his brothers of the bar, and that the Bar Association has, so early in its career, set the example of honoring the great jurists who have adorned the past history of our State."

A Copy—Teste: HENRY B. SMITH, *Secretary.*

REPORT OF SPECIAL COMMITTEE ON LAW REFORM*

(AS SUBMITTED—MIN., P. 14).

To the Virginia State Bar Association:

Page 8. At the last session of the Bar Association, held in July, 1892, the following resolution was passed:

"*Resolved*, That it is the sense of this association that law and equity procedure should be consolidated, so that legal and equitable rights can be administered in one form of action.

*The paging of the report as originally printed and distributed to members is preserved on the margin of this report.

"*Resolved further*, That the report of the Special Committee be recommitted to it with directions to report a more perfect system of legal procedure than the tentative one returned with their report, and that said scheme contain a set of rules, orders and forms such as should be adopted and used as a part of the proposed mode of legal procedure."

Under that resolution this committee is acting, and having been directed to mature our report and cause it to be printed and circulated at least two months before the meeting of the association, we are glad to be able to say that their work has been completed in time to accomplish that purpose.

We report herewith a general scheme for reform in procedure in our courts which we agree in recommending to the association to be proposed by it to the General Assembly whenever the adoption of any general scheme shall be deemed feasible.

The difficulty in the way of the adoption of such a general scheme at present is found in the following section of Article V. of the Virginia Constitution:

"Section 15. No law shall embrace more than one object, which shall be expressed in its title; nor shall any law be revived or amended with reference to its title, *but the act revived or the section amended shall be re-enacted and published at length*."

Page 4. The Constitutions of the States of West Virginia, New Jersey, Ohio, Indiana, Illinois, Nebraska, Kansas, Colorado, Georgia, Alabama, Florida, Arkansas, Missouri and Oregon have the same or similar provisions, except that, in one or two of these States, the language of the Constitution fails to measure up up to the full requirements of our Constitution. In all the States named this clause has been the subject of judicial construction, and there is a substantial agreement among the courts as to the interpretation to be put upon it.

Now our system of common law and equity procedure pervades the whole body of our statute law. It is directly referred to in at least two hundred and thirty-eight independent sections of the Code, besides chapters 123, 124 and 125 on the subject of ejectment and unlawful detainer, chapters 163 and 164 on the subject of the appointment of commissioners in chancery, and chapters 144 and 145 on the subject of mandamus, prohibition and quo warranto; and is also referred to in many acts of the General Assembly since the date of March 15th, 1887. The adoption of a general system of procedure, such as is contemplated by the report of the committee made to the session of the Bar Association of 1891, and such as is embodied in the plan submitted with this report, means a complete elimination of the present common law and equity procedure from our practice and a repeal of so much of every existing statute as refers to and rests upon that system of procedure. Under the clause of the Constitution referred to, while it would perhaps be competent for the Legisla-

ture, by a single act, to repeal so much of each existing act, we do not think it could amend those statutes so as to replace the parts repealed with the proposed new system without obeying the mandate of the Constitution that "the act revived or the section amended shall be re-enacted and published at length."

Added to this technical difficulty is the fact that the new system cannot be appropriately adjusted to the great body of our statute law so that it may be made to work in harmony with it without an amendment of many statutes, the amendment of which is not necessarily called for by the clause of the Constitution cited.

To do this properly would require practically a new Code, and we doubt if either the Bar Association or the General Assembly will be found to favor such an undertaking so soon after
Page 5. the adoption of the Code of 1887, demanding, as it would seem to do, as careful a revision of existing laws as that bestowed upon them by the revisors of 1887.

It would make this report too long to cite at length the names of the many cases examined by your committee on this subject. The greater number of them will be found cited in Sutherland on Statutory Construction, section 132, and in Cooley on Constitutional Limitations, 6th ed., top p. 180, and notes to each of these works.

The case of *Lehman* v. *McBride*, 15 Ohio, p. 602, states the proposition so plainly that we cannot forbear to quote briefly from it as follows:

"The constitutional provision, to which it is said this act does not conform, was intended mainly to prevent improvident legislation, and with that view, as well as for the purpose of making all acts, when amended, intelligible, withont an examination of the statute as it stood prior to amendment, it requires every section which is intended to supersede a former one *to be fully set out. No amendments are to be made by directing specified words or clauses to be stricken from or inserted in a section of a prior statute which may be referred to, but the new act must contain the section amended.*"

In West Virginia the constitutional clause under consideration is discussed in the case of *Shields* v. *Bennet*, 8 West Va. 74, pp. 87–88, and in Virginia the effect of a new statute, as repealing an existing statute by implication, is discussed in the cases of *Fox's Adm'r* v. *The Commonwealth*, 16 Gratt. 1; *Hogan* v. *Guigon*, 29 Gratt. 705; *Davies & Co.* v. *Creighton*, 33 Gratt. 696; and in the opinion of Judge Joynes, in *Anderson* v. *The Commonwealth*, 18 Gratt. 295; but there is no direct decision of the Court of Appeals of Virginia upon the exact subject which we had to consider.

It is undoubtedly true that a large amount of our amendatory legislation has been had in direct disregard of the constitutional provision, and much confusion has resulted therefrom. More may be the result should our courts be called on to consider some case which may yet arise. We can hardly measure the trouble

which might result from the passage of so general and radical a scheme as that now proposed, unless it is accompanied with a care- Page 6. ful revision of the general body of the statute law and an amendment of all existing statutes affected by it.

Anticipating, however, that such an undertaking may possibly be deemed feasible even now, or at least in the not remote future, and in obedience to the resolution under which we were appointed, we have framed a scheme of procedure based upon the idea of a single action for all complaints, and we submit it with this report, for the present or future action of the association. This plan is taken from the Massachusetts, Connecticut and English acts, with such original suggestions as seemed to be improvements on all of those plans and better adapted to the genius and spirit of our own laws and customs.

But while we think it may not be feasible to adopt at present any general scheme of procedure, we recognize the just demand of the great body of the people and the opinion of the Bar Association as expressed in its resolution at the session of 1892, in favor of some simplification of our present modes of procedure so that technical difficulties in the way of reaching the very merits of a case may be avoided, and the time of the courts may not be consumed in the discussion and consideration of mere forms of action, and that in these respects we may put our own State abreast with the best thought of our sister States of the Union, and with the enlightened movement of reform in England.

We have carefully looked, therefore, to see whether we may not by amending some existing statutes and proposing some independent acts, in the main, accomplish our purposes and afford the desired relief, at least until there can be a complete revision of our statutes and a carefully framed general plan of procedure, and which present relief will be in such form as not to be obnoxious to the constitutional difficulty which we have been considering. We think that in the following proposed amendments and independent acts we have found the plan which will accomplish the objects sought by us.

We submit these proposed acts in the shape in which we think they should be recommended for adoption by the Legislature, and hence they take the shape of "bills" as they would appear on the calendars of the two houses:

We propose to amend section 3246 of the Code as follows:

I.

A BILL to amend and re-enact section 3246 of the Code of Virginia.

Page 7. Be it enacted by the Senate and House of Delegates of Virginia, That section 3246 of the Code of Virginia be

and the same is hereby amended and re-enacted so as to read as follows:

Section 3246. *When action not to abate for want of form.*—No action shall abate for want of form where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the case, *and in any action for the reeovery of money due on contract, it shall be sufficient for the declaration to describe plainly and with reasonable certainty the contract relied on. The common counts, with a bill of particulars, may in any such case be made a part of the declaration. And no demurrer to such declaration shall be sustained because of the form of the action. In such case the writ may describe the action simply as an action on a contract.*

NOTE.—The amendatory part is in *italics.* The effect of this amendment will be to make one personal action on contract, or the implied assumpsit, sufficient where three exist now. Thus in the action of assumpsit all the relief may be had on any cause of action as to which the pleader would now have to elect between assumpsit, debt and covenant. In this we are following the spirit of reform which led the Legislature to make one form of action for trespass and case, the advantage of which has been too obvious to need comment. A simplification, too, of the declaration as provided by the proposed amendment seems to us to secure all the advantages claimed for the bill of complaint provided by the code of procedure, while conciseness and brevity are perhaps better assured.

II.

A BILL to amend and re-enact section 3269 of the Code of Virginia.

Be it enacted by the Senate and House of Delegates of Virgina, That section 3269 of the Code of Virginia be and the same is hereby amended and re-enacted so as to read as follows:

Section 3269. *What required to be stated in a plea.*—In all civil actions hereafter brought, there shall be no such plea allowed as that known as the general issue. And no special form shall be required in any plea save pleas in abatement. Every plea shall be in writing and shall state concisely the real defence relied on.
Page 8. If the plaintiff object that a plea does not fully disclose the real defence, and the court be satisfied that the objection is well taken, it shall require the defendant to state his defence more fully. No evidence in behalf of the defendant shall be admitted except in support of the defence set out in the plea. But at any stage of the case the defendant may be permitted to amend his plea, or to file other pleas, provided the plaintiff is not thereby surprised to his disadvantage.

NOTE.—The changes here made by amendment are too complete to be recognized by *italics.* The object of the amended section is apparent. It does away with the symbolical terms of "non assumpsit," "not guilty," "*nil debet,*" etc., which frequently convey to the plaintiff no idea of the real

defence relied on, and requires the defendant in plain terms to state his real defence. He must state it, too, in this way when he has the office judgment set aside, and the plaintiff is thus advised at the earliest period of what the defendant intends to maintain. In this way, too, the defence may frequently be disposed of by demurrer, which would be wholly unavailing against a plea of non assumpsit, etc. At the same time liberal provision is made for amendments in cases of defences being disclosed by the plaintiff's, or indeed by the defendant's evidence, and for any oversight affecting matter of form. This proposed statute appears to us to go far towards affecting the object sought by the answer under the code procedure.

III.

A BILL to amend and re-enact section 3271 of the Code of Virginia.

Be it enacted by the Senate and House of Delegates of Virginia, That section 3271 of the Code of Virginia be and the same is hereby amended and re-enacted so as to read as follows:

Section 3271. *Form of demurrer or joinder in demurrer.*—The form of demurrer or joinder in demurrer *may* be as follows: "The defendant [or plaintiff] says that the declaration [or other pleading] is not [or is] sufficient in law. *All demurrers shall be in writing, and shall state specifically the grounds of demurrer relied on. And no grounds shall be considered other than those so stated.*

NOTE.—The changes here made are in *italics*. The object of this amendment is to accomplish for a defence on grounds of law what the amendment proposed to section 3269 is expected to do for defences upon the facts. No idea of what the real objection in law is, is conveyed by the word "demurrer." We think that the defendant or the plaintiff, as the case may be, should be compelled to state his real defence in law.

IV.

A BILL to repeal section 3267 of the Code of Virginia.

Page 9. Be it enacted by the Senate and House of Delegates of Virginia, That section 3267 of the Code of Virginia be and the same is hereby repealed.

NOTE.—We cannot understand what possible difference it can make to the investigation of truth whether a traverse concludes to the country or with a verification. But such requirements do raise technical difficulties and ought to be abolished.

V.

A BILL to amend and re-enact section 3286 of the Code of Virginia.

Be it enacted, That section 3286 of the Code of Virginia be and the same is hereby amended and re-enacted so as to read as follows:

Section 3286. When in any action on contract for the payment of money no plea in bar to be received, or inquiry of damages

made, unless defendant file with plea affidavit denying plaintiff's claim, but judgment given therefor.

In *any action* on a contract, express or implied, for the payment of money (except where the process to answer the action has been served by publication), if the plaintiff file with his declaration an affidavit made by himself or his agent, stating therein, to the best of affiant's belief, the amount of the plaintiff's claim, that such amount is justly due, and the time from which the plaintiff claims interest, no plea in bar shall be received in the case, either at rules or in court, unless the defendant file with his plea the affidavit of himself, or his agent, that the plaintiff is not entitled, as the affiant verily believes, to recover anything from the defendant on such claim, or stating a sum certain less than that set forth in the affidavit filed by the plaintiff, which, as the affiant verily believes, is all that the plaintiff is entitled to recover from defendant on such claim.

If such plea and affidavit be not filed by the defendant, there shall be no inquiry of damages, but judgment shall be for the plaintiff for the amount claimed in the affidavit filed with his declaration.

Page 10. If such plea and affidavit be filed, and the affidavit admits that the plaintiff is entitled to recover from the defendant a sum certain less than that stated in the affidavit filed by the plaintiff, judgment may be taken by the plaintiff for the sum so admitted to be due, and the case be tried as to the residue.

VI.

A BILL to amend and re-enact section 3272 of the Code of Virginia.

Be it enacted by the Senate and House of Delegates of Virginia, That section 3272 of the Code of Virginia be, and the same is, hereby amended and re-enacted so as to read as follows:

Section 3272. *What defects not to be regarded on demurrer.*—On a demurrer (unless it be to a plea in abatement, the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action or defence that judgment according to law and the very right of the cause cannot be given.

NOTE.—The amendment consists in omitting the residue of the section, which is rendered wholly useless by the amendment already proposed.

VII.

A BILL to regulate proceedings in jury trials in civil cases.

Be it enacted by the Senate and House of Delegates of Virginia, That in any civil case tried by a jury the court shall sum up the

evidence and charge the jury as to the law applicable to the evidence whenever requested by either party, subject to all just exceptions.

NOTE.—This is quite a radical change from the rule at present in Virginia. Our decided cases have carried the matter of the judges right to comment on the evidence so far that it is often embarrassing to him to venture to instruct on the law lest he pass the dividing line. We think that the experience of all the States where the rule suggested in the proposed act prevails, and of the United States courts, is that the summing up of the judge is a great aid to a just verdict in jury cases. The rule is so universal and gives so much satisfaction that we think it will remove many of the objections to jury trial if incorporated into our law.

VIII.

A BILL to simplify the mode of procedure in actions at law and in suits in equity.

Page 11. Be it enacted by the Senate and House of Delegates of Virginia:

1. That in every proceeding at law the principles of common law and equity shall be alike applicable, and the same relief shall be administered, so far as the nature of the proceeding will admit, but wherever the principles of law and equity conflict, the principles of equity shall prevail.

2. That whenever a suit is brought in equity, which should properly have been brought at law, the suit shall not, for that reason, be dismissed, but the court shall cause it to be transferred from the chancery to the law docket of the court; shall designate the proper form of action, and leave shall be given to amend the same as to parties and pleadings to such extent as may be necessary to afford proper relief. And whenever it shall appear to the court that the proper relief or the whole relief demanded and to which the party is entitled cannot be given in an action at law, according to the principles of equity applicable to the case, the cause shall be transferred from the law to the chancery docket of the court, and thenceforth shall proceed as a suit in chancery, and to that end leave shall be given to make such amendments as to parties and pleadings as may be necessary to afford proper relief.

3. Any case which may be at any time in the Chancery or Circuit Court of Richmond city, and subject to the provisions of section 1 or section 2 of this act, shall be transferred from the Circuit Court of said city to the Chancery Court, or from the Chancery Court of said city to the Circuit Court, as the case may be.

4. This statute shall be liberally construed, to the intent that justice be not delayed or denied by reason of the form of the proceeding.

NOTE.—The committee regard this statute of great importance as going far to supply two of the just demands of reform, that principles of equity shall be fully administered in all cases, whether their form be at law or in

chancery, and that neither loss nor delay shall result from a mistake in the application to the proper forum. We can see no good reason for (Page 12.) dismissing a good cause merely because the sufferer applied for relief at the wrong door. Every reason of justice and right demands that he should be merely directed to the proper tribunal when such a mistake has been made. And if the form of the remedy, as at law, is too narrow or not supple enough to enable justice to be done upon principles of equity, we think the parties should at once have their cause transferred to that forum whose machinery is adequate to meet the ends of right and justice.

IX.

A BILL to amend and re-enact section 2901 of the Code of Virginia.

Be it enacted by the Senate and House of Delegates of Virginia, That section 2901 of the Code of Virginia be amended and re-enacted so as to read as follows:

Section 2901. *Trespass on the case, trover and detinue.*—In any case in which an action of trespass or of trespass on the case will lie, either of those actions may be maintained; and in any case in which an action of trover or of detinue will lie, either of those actions may be maintained.

NOTE.—The object of this amendment was to do for trover and detinue what the section as it already stood has done for case and trespass on the case—*i. e.*, to make them synonymous actions, and at the same time to remove the obscurity of the language of the original statute as to trespass and case.

X.

A BILL to amend and re-enact section 3267 of the Code of Virginia.

Be it enacted by the Senate and House of Delegates of Virginia, That section 3267 of the Code of Virginia be amended and re-enacted so as to read as follows:

Section 3267. *Replications to pleas.*—In any action the plaintiff may reply as many matters, whether of law or fact, to the defendant's plea as he may think necessary. There shall be no other traverse of any plea, or joinder of issue on the part of the plaintiff, than that the plaintiff "replies generally" to such plea, or words to that effect; and by such a traverse, or by going to trial without any traverse, the plaintiff shall be considered as controverting all the material allegations of the plea. (Page 13.) But when the plaintiff relies upon new matter in answer to the plea he shall state the same specially in his replication in plain and concise language; and no evidence shall be received of any new matter which is not so stated. There shall be no pleading subsequent to the replication.

NOTE.—The abolition of all forms of pleas, and hence of formal commencements and conclusions. as attempted in the committee's amendment to section 3269, seems to call for speeial provision as to the subsequent

pleadings. Under the system now prevailing, the *conclusion* of the plea (*e. g.*, to the country or with a verification) determines the character of the replication, *i. e.*, whether it shall be a mere *similiter*, or whether it shall be special.

It seems to the committee that the present rule, which insists upon absolute singleness of issue in all pleadings subsequent to the plea, and therefore prohibiting a demurrer and a reply to the same plea, is unsatisfactory to the profession and should be abolished. The practice in the courts in allowing the same thing to be indirectly accomplished (as by motion to strike out the plea or the withdrawal of a demurrer before final judgment upon it, and then replying to the fact) indicates the necessity for a relaxation of the rule. It is the intention of the above amendment to allow the same latitude in respect to the replication as already exists in respect to pleas.

It is of first importance that the parties come to an issue as speedily as possible. Doubtless this consideration induced the courts to give such latitude to the plea of the general issue, in order to cut off subsequent pleadings, which not only prolonged the litigation, but frequently confused the issues. The above amendment proposes to abolish all pleadings subsequent to the replication. Indeed, it practically dispenses with the replication itself, except where new matter is relied upon in answer to the plea, thus somewhat assimilating the procedure to the practice in chancery, where the general replication makes up the issue. When the plaintiff has set out his case at large in his declaration, and the defendant has in his plea stated his defence with equal clearness, as the amendment of section 3269 requires that he shall do, there is no practical need of a replication, save in setting up new matter.

XI.

A BILL to amend and re-enact section 2717 of the Code of Virginia.

Be it enacted by the Senate and House of Delegates of Virginia, That section 2717 of the Code of Virginia be amended and re-enacted so as to read as follows:

Page 14. Sec. 2717. *Service of the summons; when and where returnable; plea of defendant; how case tried; its precedents.*—The summons, when issued from the clerk's office of a court, may be returnable to and the case heard and determined at any term of said court. When issued by a justice it may be returnable to and the case heard and determined by any justice of said county, city or town: provided the same be made returnable to some place within the magisterial district, ward or town in which the defendant resides. Such summons shall be served at least five days before the return day thereof. If the defendants appear and plead, *the issue shall be made up according to the practice regulating pleadings in personal actions. Upon such issue*, or upon the return of the first or any subsequent summons "executed," the court or justice, as the case may be, shall try whether he unlawfully withholds the premises in controversy. When the summons is returnable to a court, a jury may be empaneled to try the case, upon the application of either party, at any time before the trial. Such causes shall have precedence over all other civil causes on the docket.

XII.

A BILL to amend and re-enact Section 2734 of the Code of Virginia.

Be it enacted by the Senate and House of Delegates of Virginia, That section 2734 of the Code of Virginia be amended and re-enacted so as to read as follows:

Sec. 2734. *Of the defence.*—The defendant may demur to the declaration, or plead thereto, or do both. And the pleadings in such action, subsequent to the declaration, shall conform to the practice regulating pleadings in personal actions, except where it is otherwise specially provided.

In proposing these several amendments and independent acts it is designed also to recommend to the Legislature that they shall not take effect for some considerable time after their passage. This is, of course, to be desired so that the members of the bar may have ample time to familiarize themselves with these contemplated changes before they become operative.

Page 15. While the committee thinks these proposals conservative, yet they are directly in the line of, if they do not practically accomplish, all that is sought by the advocates of reform, and at the same time the names of and associations with our ancient system are substantially preserved. We concur, however, in thinking that if it was practicable it would be better to carry out literally the resolution of the association in favor of *one form of action*, which would embrace personal actions, bills in equity, and the real actions of ejectment and unlawful detainer, which under the proposed amendments and acts recommended by us must still remain in force.

While, therefore, we agree in urging upon the Legislature the adoption, at its next session, of the amendments and acts set out in this report, we also agree in commending to that body the adoption at the earliest time at which it may be regarded as feasible to make the necessary general revision which must accompany so comprehensive a plan of procedure, of the scheme which we submit with this report as an appendix thereto.

In view of the recommendations made by us we have not prepared the contemplated rules of court and forms which are intended to accompany the proposed plan. That, however, will not be a matter of much difficulty, and can be done as soon as the policy of the association on the subject shall be distinctly declared. Respectfully submitted,

S. S. P. PATTESON,
THOMAS S. MARTIN,
W. M. LILE,
R. T. BARTON,
J. R. TUCKER,
R. T. W. DUKE,
Committee.

APPENDIX

WITH

REPORT OF SPECIAL COMMITTEE ON LAW REFORM.

[PAGE 17.]

The following plan of procedure, presented as a part of the report of the Special Committee on Law Reform, is founded upon the former plan reported by the same committee (with some change in its membership), and which is printed on p. 59, *et seq.*, of Vol. IV., Annual Reports of the Virginia State Bar Association. That plan follows very closely the Connecticut act, but from that we have departed in many respects. We have inserted instead some of the features of the Massachusetts act, and have changed many of the sections of the original plan so as to conform the scheme more nearly to the practice and customs which have prevailed for so many years in Virginia so far as that could be done consistently with so radical a change.

We unite in commending to the Association the adoption of a mode of procedure based upon the idea of "one form of action," and we also commend the scheme herewith presented as a possible basis upon which to build a better plan; but all of its parts do not by any means meet with the unqualified approval of all the members of the committee. Having given in the report the reasons why we think no general plan can be adopted without a close revision of our statute law, we anticipate that the scheme which we report will also be subjected to the scrutiny and revision of whatever body shall revise the general statutes. Out of that and also from the criticism to which this plan now offered will properly and necessarily be subjected by the bar of the State, we hope there may grow so perfect a system as that it may accomplish the object sought by a reform in our procedure—stripping litigation bare to its very merits, so that lawyers and courts
Page 18 may spend their time in considering the justice and right of the case, not wasting their energies in its forms and ceremonies.

To the scheme presented we have added a set of notes, which serve to explain the reasons influencing us in preparing each of the sections of the plan.

TITLE.

In lieu of the title reported by the Committee. See Note 1.

An Act to provide a Code of Procedure in civil cases and to amend and re-enact Sections 3378 and 3379 of the Code of Virginia, so as to conform the same to the provisions of this Act.

Be it enacted by the Senate and House of Delegates of Virginia

Abolishing distinctions between Law and Equity procedure.

Same as Sec. 1 of report of Committee, except words in capitals. See Note 2.

1. That the distinction heretofore existing between the SEVERAL FORMS OF ACTIONS AT LAW AND BETWEEN ACTIONS AT LAW AND SUITS IN EQUITY is hereby abolished, and there shall be in this State hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.

Exceptions.

In lieu of Sec. 26 of report of Committee. It exempts the proceedings by quo warranto, attachments, etc., from the operation of this act.

2. This act shall not, however, apply to or in any wise affect Chapter 146 of the Code of Virginia providing for the writ of Habeas Corpus; or to Chapter 144 Code of Virginia, providing for writs of Mandamus and Prohibition; or to Chapter 145 Code of Virginia providing for the writ of Quo Warranto; or to Chapter 141 Code of Virginia providing for proceedings by Attachment, except so far as this act affects the form of the action. Nor shall this act apply to or in anywise affect any provision of the Code of Virginia or of existing statutes, which provide a remedy by motion, nor shall it affect the proceeding by writ of Certiorari, nor be applicable to any proceeding before and within the jurisdiction of a Justice of the Peace, or in the County Courts, or in the Hustings Court of the City of Richmond.

Page 19

Jurisdiction to administer legal and equitable principles.

Same as Sec. 6 of report of Committee, except words in capitals.

3. ALL COURTS HAVING JURISDICTION TO TRY CIVIL ACTIONS, WHETHER THEY ARE ON THE COURT OR JURY DOCKET, shall hereafter, to the full extent of their respective jurisdictions,

administer legal and equitable remedies, CONSISTENT WITH THIS ACT, in favor of any party, provided that wherever there is any variance between the rules of the common law and of equity in reference to the same matter, the rules of equity shall prevail.

Process to commence suit.

4. The process to commence a civil action shall be a writ commanding the officer to whom it is addressed to summon the defendant to answer the same. It shall be issued on the order of the plaintiff, his agent or attorney, and shall not, after it is issued, be altered, nor any blank therein filled up, except by the clerk. Same as Sec. 9 of the Committee.

Process continued.

5. The writ shall issue from the clerk's office of the court in which the suit is brought, and shall be made returnable to the first day of the next or second succeeding term of that court, as the plaintiff, his agent or attorney shall direct: provided, however, that no case shall be set for hearing at any term of court, as to any party upon whom the writ has not been duly served at least ten days before such term, unless such party shall appear in person or by attorney as if the writ had been duly served. If no demurrer or plea be filed, final judgment shall be entered in every case set for hearing, except where there is an unexecuted order for an inquiry of damages, upon the last or fifteenth day of the term of court, whichever shall happen first. New. See Note 3.

Page 20 } *The complaint.*

6. The first pleading on the part of the plaintiff shall be known as the complaint, and shall contain a statement of the facts constituting the cause of action, and a demand for the relief to which he supposes himself entitled [*] AND IN HIS SAID COMPLAINT, OR ON THE BACK THEREOF, HE SHALL STATE WHETHER HE CLAIMS THE SAID RELIEF FROM THE COURT OR JUDGE ALONE, OR THAT HE CLAIMS A TRIAL BY JURY. All written instruments, except policies of insurance, shall be declared on by setting out a copy of such part as is relied on, or the legal effect thereof, with proper averments to describe the cause of action. If the whole contract is not set out, a copy, or the original, as the court may direct, shall be filed on mo- Down to [*] from Sec. 1 of report of Committee (capitals) added by us. After caps from clause 9, page 965, Massachusetts act. See Note 4

tion of the adverse party. When it may be necessary, the copy so filed shall be part of the record, as if oyer had been granted of a deed declared on according to the common law. No profert or excuse therefor need be inserted in the complaint. If the instrument relied on is lost or destroyed, or is not in the power of the party who relies on it, he shall state the substance of it as nearly as he can, and the reason why a copy is not given.

Joinder of causes of action.

In lieu of Sec. 7 of the report of the Committee. See Note 5.

7. In any civil action the plaintiff may include in his complaint both legal and equitable rights and causes of action, and may demand both legal and equitable remedies; but when several causes of action are united in the same complaint they must be brought to recover, either

[1] Upon contracts, express or implied.

[2] For injuries, with or without force, to person and property or either, including a conversion of property to the defendant's use, or

[3] For injuries to character, or

[4] Upon claims to recover or subject real property, with or without damages, for the withholding thereof, and the rents and profits of the same, or

Page 21

[5] Upon claims to recover personal property specifically, with or without damages, for the withholding thereof; or

[6] Upon claims arising by virtue of a contract or by operation of law, in favor of or against a party, in some representative or fiduciary capacity; or

[7] Any matters which, before the adoption of this act, might have been united in the same bill in chancery, or in the same declaration at law.

Changes are in capitals.

[8] But the several causes of action so united must all belong to one of these classes, and except WHEN THE PROCEEDING is for the foreclosure of mortgages, DEEDS OF TRUST or OTHER LIENS, must affect all the parties, and not require different places of trial, and must be separately stated; and in all cases where several causes of action of the same class are so joined in the same complaint, or as matter of counter claim or set-off in the answer, if it appear to the court that they cannot all be conveniently heard together, the court may order separate trials of any such causes of action, or may direct that any one or more of them be expunged from the complaint or answer.

Dilatory defences, in abatement.

8. If the defendant desires to plead to the jurisdiction, or in abatement OTHERWISE, or both, he shall take such exception substantially in the following form: Taken from Sec. 1 of report of Committee, except the parts in capitals which we have added. See Note 6.

"The defendant pleads in abatement because—[here state all the particular exceptions to the jurisdiction and causes of abatement, and how the plaintiff might or should have brought his action in order to avoid them, if they are such as should have been avoided.]

And therefore he prays judgment.

____

by A B, his Attorney."

BUT NO PLEA TO THE JURISDICTION, OR OTHERWISE IN ABATEMENT, SHALL BE FILED AFTER THE DAY TO WHICH THE WRIT IS MADE RETURNABLE, IF IT BE SO RETURNED, OR AFTER A DEMURRER OR ANSWER IS FILED EXCEPT ON SAID RETURN DAY, AND ALL THE OTHER RULES RELATING TO PLEAS IN ABATEMENT, AS THEY NOW EXIST, SHALL CONTINUE IN FORCE. Page 22

Defence to merits, answers, demurrers.

9. All defences, other than those to the jurisdiction or in abatement, shall be made by an answer or by a demurrer. From Sec. 1 of the report of the Committee.

Demurrers.

10. All demurrers shall be in writing, and shall distinctly specify the reasons why the pleading demurred to is insufficient. And grounds of demurrer not so stated shall be deemed to have been waived. In lieu of Sec. 2 of report of Committee. See Note 7.

Answers

11. The defendant in his answer shall specially deny such allegations of the complaint as he intends to controvert, admitting the truth of the other allegations, unless he intends, in good faith, to controvert all the allegations, in which case he may deny them generally, as follows: Same as Committee's Sec. 3, exc't words after "under a generał," &c., omitted.

"The defendant denies the truth of the matters contained in the plaintiff's complaint."

He may also in his answer state special matters of defence, and shall not give in evidence any matter in avoidance, or of defence, consistent with the truth of the material allegations of the complaint, unless in his answer he states such matter specially.

Affidavits.

New. Adopted from Secs. 3279 and 3280, Code 1887.

12. No affidavit shall be required to any complaint except where it prays for an injunction, mandamus, prohibition, for the appointment of a receiver, or to attach property, in which cases affidavits are required; but where a complaint or other pleading alleges that any person made, endorsed, assigned or accepted any writing, no proof of the fact alleged shall be required, unless an affidavit be filed with the pleading putting it in issue, denying that such endorsement, assignment, acceptance or other writing was made by the person charged therewith, or by any one authorized by him, and where plaintiffs or defendants sue or are sued as partners, and their names are set forth in the complaint or answer or other pleading, or where plaintiffs or defendants sue or are sued as a corporation, it shall not be necessary to prove the fact of the partnership or incorporation unless with the pleading which puts the matter in issue, there be an affidavit denying such partnership or incorporation.

The former report omitted all provisions as to affidavits. Page 23

Replications.

Substantially same as Sec. 4 report of Committee.

13. The plaintiff may demur and reply to the answer; and in such reply he may admit some and deny others of the allegations; or by a general denial of the defendant's answer, where the answer is special, put the defendant upon proof of all material facts in the answer alleged AFFIRMATIVELY, but under such general denial, he may not give in evidence any matter in avoidance, unless it be specially replied.

General rules applicable to pleadings.

Taken partly from Sec. 2, page 964, of Massachusetts act, and in part from Secs. 8–9, report of Committee, and in part new. See Note 8.

14. No averment need be made in any pleadings which the law does not require to be proved, but the substantive facts necessary to constitute the cause of action must be stated with substantial accuracy and without unnecessary verbiage.

Unnecessary repetition, prolixity, scandal, impertinence, obscurity or uncertainty in any pleading shall be

ground for a motion to expunge or otherwise correct such pleading.

Such motion shall be in writing and shall specify the particular exceptions, and a copy thereof shall be left with the adverse party or his counsel at least two days before the same shall be brought to the attention of the court.

Page 24 When the pleadings do not fully disclose the grounds of the claim or defence, the court may, on motion, order fuller or more particular statements; and if, in the opinion of the court, the pleadings do not sufficiently define the issues in dispute, it may direct the parties to prepare other issues, and such issues shall, if the parties differ, be settled by the court in a summary way.

Who to be plaintiff.

15. All persons having interests in the subject of the action and in obtaining the judgment or other relief demanded, may be joined as plaintiffs, except as otherwise expressly provided; AND ANY PERSON HAVING AN INTEREST IN COMMON WITH THE PLAINTIFF, AND NOT UNITING AS A PLAINTIFF, MAY BE MADE A PARTY DEFENDANT.

In lieu of Sec. 10, the changes appearing by the capitals See Note 9.

Mistake in party plaintiff.

16. When any action has been commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it has been so commenced through mistake, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff.

Same as Sec. 16 of report of Committee.

Mistake in party defendant.

17. Any person may be made a defendant who has or claims an interest in the controversy or in any part thereof adverse to the plaintiff, or whom it is necessary for a complete determination or settlement of any question involved therein, to make a party.

Taken from Sec. 11 of Committee.

Parties generally.

18. The court may determine the controversy as between the parties before it, when it can do so without prejudice to the rights of others; but when a complete

From Sec. 14 of report of Committee.

determination cannot be had without the presence of other parties, the court may order them to be brought in.

Page 25 And when a person not a party has an interest or title which the judgment will affect, the court, on his application, shall direct him to be made a party.

When real estate may be directed to be sold.

New. See Note 10. 19. When the object of the action is to subject real estate to the payment of liens or other debts, if there is enough before the court to show that the real estate is so liable and will eventually have to be sold, the court shall order the sale thereof without first ascertaining all the debts or settling all the controversies: provided the sale may be so made with a due regard to the interests of all persons concerned: and provided further, that all lien creditors and other persons having liens on the real estate have been first made parties to the suit and it has been duly set for hearing as to them.

Where parties are numerous.

Same as Sec. 12, report of Committee. 20. When the persons who might be made parties are very numerous, so that it would be impracticable or unreasonably expensive to make them all parties, one or more may sue or be sued, or may be authorized by the court to defend for the benefit of all.

Misjoinder, nonjoinder, new parties.

Same as Sec. 15, report of Committee. 21. No action shall be defeated by the nonjoinder or misjoinder of parties. New parties may be added and summoned in, and parties misjoined may be dropped by order of the court, at any stage of the cause, as it may deem the interests of justice to require.

Parties in case of set-off.

Same as Sec. 17, report of Committee, except word set-off in caps added. 22. When a counter claim or SET-OFF raises questions affecting the interests of third persons, the defendant may, and if required by the court, shall, cause such persons to be summoned in as parties to said cause.

Page 26 *Effect of change of parties.*

Same as Sec. 18, report of Committee. 23. No change in parties, made by order of court, shall impair any previous attachment of the estate or body of any person remaining a defendant in the action, nor im-

pair bonds or recognizances of any person remaining a party, either as against himself or his sureties, nor impair receipts to the officer for property attached; and when parties are changed, the Court may order new bonds, if such bonds are deemed necessary. Orders of court concerning changes in parties may be upon terms as to costs or otherwise, at the discretion of the court.

Docket and division of court and jury cases.

24. Sections 3378 and 3379 of the Code of Virginia are hereby amended and re-enacted so as to read as follows: **In lieu of Sec. 20, report of Committee. See Note 11.**

Before any term of a Circuit or Corporation Court the clerk of each of said courts shall make out a docket of the pending cases, as follows, to-wit:

[1] Cases of the Commonwealth.

[2] Motions and actions in the order in which notices of the motions were filed, or in which the processes were served, docketing together as new cases those not on the docket at the previous term; and the clerks of the courts **See Note 18.** of record in the city of Richmond shall also put on the docket with said new cases, as soon as matured, and in the order in which they are matured, all cases matured during the terms of said courts.

The clerks of the said courts shall put on one docket, to be called the "Court Docket," all cases indicated in or upon the back of any complaint as proper to be tried by the court or judge, and upon another docket, to be called the "Jury Docket," all other civil cases.

[3] If objection be made that a case is put upon the wrong docket the court shall, upon an inspection of the record, determine upon what docket the case shall be placed, and from such determination there shall be no appeal, but after a case has been tried and judgment rendered therein the court shall permit the complaint to be amended so that the judgment may be enforced against the real estate of the judgment debtor. Page 27

[4] Every action involving the validity of a will, or for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract or as damages for breach of any contract, or for injuries to persons or property, or for any other civil cause of action for which the right of trial by jury exists at the time of the passage of this act, shall be tried as now provided by law, by a jury, provided either party demand such trial.

Every other civil action or issue shall be tried by the court, as cases in chancery are now tried, except that wherever any party is now entitled to an issue out of chancery, to be tried by a jury, he shall have the same right under this act.

[5] The rules of evidence and of the examination of witnesses and of the production of proof shall be as they now exist, but in any case on the "Court Docket" the judge or court may hear the evidence *ore tenus*, and in such cases, on appeal, the evidence or the facts shall be certified as now provided by law in actions at law, or upon the trial of motions.

[6] The judge or court shall, of his own motion, or on motion of either party, refer any civil action either to a special referee, wherever under the rules of practice now in force, a reference to a commissioner in chancery would be proper, or wherever the judge or court deems such a reference proper to the ends of justice. Upon such a reference the examination of witnesses before the referee, when so demanded by any party in interest shall be in writing by question and answer, and the deposition if required shall be signed by the witness. And upon like demand, all or so much thereof as is required of the evidence so taken before the referee, shall be returned by the referee to the court with his report.

Page 28 *Forms, rules and orders.*

Follows Sec. 27 of the Committee. 25. The judges of the Supreme Court of Appeals shall have power at the regular sessions of the court, or other meeting called for that purpose to make all such orders and rules AND TO PRESCRIBE SUCH FORMS as shall be necessary and proper to give full effect to the provisions of this act; and said judges on or before the day of 189 , shall prepare orders, rules and FORMS as above authorized, which they shall transmit to the superintendent of public printing, who shall cause the same forthwith to be printed and distributed to THE JUDGES OF THE COURTS OF RECORD OF THIS STATE, and sold at cost to all licensed attorneys practicing in this State.

Construction of this act, etc.

New. 26. This act shall be liberally construed, and all acts and parts of acts, and all provisions of the Code of Virginia inconsistent with this act, are hereby repealed, but

all of said provisions and acts and all existing rules of practice not inconsistent with this act shall remain in full force.

When act takes effect.

27. This act shall take effect on the day of , 189 , but it shall not affect any action or suit pending on the day of 189 . Same as Sec. 28 of Committee. See Note.

NOTES.

These notes are offered in explanation of the reasons which govern us in proposing the foregoing scheme of procedure, and especially to show why we departed from the scheme heretofore reported by the committee and the extent of such departures.

NOTE 1—THE TITLE.

The simpler form of the title to the Connecticut act seemed better than the title returned with the former report [Bar Association, Vol. IV., p. 53], but we have departed also somewhat from that form. It will be observed that the title re- Page 29 ported by the committee before amends sections 3223, 3378 and 3379, whereas, in fact, only sections 3378 and 3379 are in form so amended. In this respect the title has been corrected.

Attention is called to the different chapters of the Code not affected by this act. In the chapters on Attachments, Ejectment and Unlawful Detainer especially many changes will have to be made to adapt them to this new proposed procedure. In making these and other changes it will be better seen how far this proposed scheme will itself have to be changed in order to render the whole system harmonious.

NOTE 2—SECTION 1.

Abolishing distinctions between law and equity procedure.

There is no material variance of this section from section 1 of former report. We doubted, however, if the language of that report did distinctly destroy the distinction now existing between the several forms of actions at law, and therefore we have endeavored to remove all doubt about it.

NOTE 3—SECTION 5.

Process continued.

This is intended as a substitute for rules and rule days, which we consider an expensive and troublesome superfluity. Cases

mature to court under this provision, and there is no such thing as an issue in the Clerk's Office or a judgment there except as otherwise provided by statute for a confession of judgment.

NOTE 4—SECTION 6.

The complaint.

This section 5, as shown by the marginal note, is taken in part from the 1st section of the committee. Then we have added a part in capitals. This part so added is meant to make the act accord with our section 24, offered in lieu of section 20 of the committee. The committee's plan makes the complaint wholly ignore the question of whether the cause of action is one for the Page 30 court or jury [substantially chancery and law as at present], and at each term the judge of the court is to take all the cases, examine them and then distribute them between the court and jury docket as he shall find the character of the cases to be. It seems to us that this would be a very awkward arrangement and would involve a degree of unaided labor which the judges are not apt to perform, or if performed, it is likely to be only perfunctory. The better plan seems to us to make each suitor claim the appropriate jurisdiction for relief, and if he seeks the wrong forum the court can determine the right one on objection being made. It will be observed from section 24 that if the suitor claims the wrong jurisdiction the only effect will be that the court will place his case in the place where it properly belongs.

The part of the section which we offer after the capitals is taken substantially from clause 9, page 965, of the Massachusetts statute, and seems to us a wise provision for making the plaintiff state his real case, which is the principal object to be affected by abolishing the old forms. The statute, too, has been in force in Massachusetts long enough to be the subject of rulings by its courts, from which much advantage may be had by us in construing this new system.

NOTE 5—SECTION 7.

Joinder of causes of action.

Section 7 is in lieu of section 7 of the report of the committee. This provision of the proposed act makes a radical change in the practice in Virginia, and should receive most careful consideration. The committee in its former report has merely copied from the Connecticut act, where we suppose land may be sold under execution, or where at least the intricacies of our creditors' bill to subject land to the payment of debts do not exist

inasmuch as the court may enforce any judgment by execution in furtherance of the same proceeding, we see no reason why, after a judgment is rendered under the proposed procedure, there may not be an amendment of the complaint asking for the judgment, and then by transferring the case to the "court docket" permit the case to be carried on as the same suit, with proper amend- Page 81 ments, instead of driving the plaintiff to another and separate suit, as now, to enforce his judgment lien. If the idea of "one action" is to be maintained, some such provision as this is absolutely necessary. We have so provided in this and in section 19 of this act. The change effected by this section will involve new questions of the finality of a judgment, the time and mode of appeal, etc., all of which will have to be carefully considered in revising the statutes to adjust them to this new mode of procedure.

Note 6—Section 8.

Dilatory defences—In abatement.

Section 8 follows section 1 of the former report, except that this proposed section preserves the old rules [adjusted to the new procedure] as to the time of filing pleas in abatement, which were abrogated by the former report, but the wisdom of which we think experience has demonstrated.

Note 7—Section 10.

Demurrers.

This section requires all demurrers to be in writing and to state the real objection in law offered to the complaint or answer. About the wisdom of this and its improvement upon our present practice there can scarcely be a doubt.

Note 8—Section 14.

General rules applicable to pleading.

Section 14 is taken partly from sections 8 and 9 of the report of the committee, but the first clause is mainly taken from clause 2, page 964, of the Massachusetts act, and is offered in lieu of the first part of section 8 of the committee's scheme. It seemed to us more concise and comprehensive in its language, and yet less technical. This gives us, too, the benefit of the Massachusetts rulings upon questions of prolixity, etc.

The latter half of both sections 8 and 9 is retained as the same are reported, but we have omitted the first half of section 9, because it seemed to us more likely to give trouble than to be of any real benefit.

Page 82

NOTE 9—SECTION 15.

Who may be plaintiff.

This section 15 is taken substantially from the committee's section 10, but as the committee only provided for making parties having a common interest defendants, when they should decline to be co-plaintiffs, we thought the section should be changed in that respect. It may not unfrequently occur that you cannot find the parties to give them an opportunity to consent or decline; or your interests may greatly suffer while you wait for such an opportunity or for their slow decision; or they may obstinately neither consent or decline. The committee's act restricts the remedies now existing in this particular, while just the reverse is the policy of reform.

NOTE 10—SECTION 19.

When real estate may be directed to be sold.

This is an addition to the former report, which is silent on this subject. We think it a salutary amendment of the present practice. Under the rule now existing it is in the power of a single person making a claim to a lien upon real estate to delay its sale almost until it suits him to have his claim determined. Sometimes he comes in at the last moment and files a petition or in some way suggests upon the record his supposed interest, whereupon everything must stop and wait for him. It often happens that he has no interest at all in the subject, but the effect meanwhile is to pile up costs and not unfrequently to consume the whole subject in litigation or waste while the suit lingers. Whatever advantage there may sometimes be in postponing a sale until every interest is determined, experience shows that it is counterbalanced by the harm which otherwise results. But under the proposed statute, it is still in the power of the court to delay a sale if the ends of justice require it. All that the act provides is to give the court, the power to sell [which it does not now possess] when the interests of the parties demand it, instead of waiting for frivolous and uncertain controversies to be ended.

Page 83

NOTE 11—SECTION 23.

Docket and division of court and jury cases.

Section 23 is offered in lieu of section 20 of the former report. It differs therefrom just as the frame of this scheme differs from that before reported, in keeping more carefully apart the court and jury cases. This distinction is also stated with more elaboration

and detail. The relative merits of the two schemes can only be properly weighed by reading them carefully and comparing them.

Special provision is made for the jurisdiction of the Richmond city courts.

Clause 5 of this section 23 permits the evidence in a proper case to be *ore tenus*, where, under the practice in chancery now, it has to be entirely in writing. This, it seems to us, is a much needed reform, both for convenience in saving costs and so that it may not be hereafter said that all men are six feet high "on paper." This rule has not unfrequently defeated the ends of justice.

Clause 6 regulates the matter of orders of reference. We think the scheme offered a conservative one. It preserves the right of reference where it exists in chancery now, and also extends it to jury cases and wherever the ends of justice require it.

NOTE 12.

Omitted Sections.

It will be observed that we have wholly omitted from this scheme sections 5, 9, 21, 22, 23 and 24 of the report of the committee.

Section 5 is omitted because it seemed to us that the whole subject is provided for by the chapter of the Code on set-off, which is in no wise affected by this statute, except so far as its scope of action is enlarged by the more liberal policy and mode of procedure provided by this act. Section 5 did not seem to us to add anything to the law, and might lead to confusion.

Section 9 is omitted because we did not think it practicable of enforcement, and because we thought it tended to limit and make technical the mode of procedure provided by the act.

Section 21 seemed to us to be covered by clause 6 of section 24, and therefore to be unnecessary.

Section 22 seemed to us to be better provided for by section 3250 of the Code and by section 10 of this act.

Page 84 Section 23 is, we think, covered by section 2 of this act, exempting the writ of habeas corpus, etc., from its operations.

We could not see the value of the rule provided by section 24 over the existing rules as to new trials, but we say this with some doubt. Section 24, in some emergencies of the proposed mode of legal procedure, may be a very necessary part of the policy and fair enforcement of this act.

Note 13—Section 26.

Construction of this act, etc.

However, much care is taken to avoid such a necessity, yet it can scarcely be contemplated that this act will not share the fate of all reforms and will escape being the subject of judical construction before it is generally understood and accepted. We, therefore, deemed it wisest to indicate in the act itself the spirit in which it is adopted and desired to be put in force. The courts should have due regard to this in construing clauses which may possibly be open to two interpretations.

We have followed an ancient custom in further providing that acts in conflict with this act are hereby repealed. This would, of course, be the effect at any rate of the adoption of this act. The phrase is merely inserted here out of abundant caution. We have already dwelt with earnestness upon the necessity of a general revision and amendment of existing acts before this proposed scheme can be put in operation.

Note 14—Section 27.

When act takes effect.

Our opinion is that very ample time should elapse between the adoption of so great a change as this scheme effects and the time at which it will go into operation.

S. S. P. PATTESON,
THOMAS S. MARTIN,
W. M. LILE,
R. T. BARTON,
R. T. W. DUKE,
Committee.

REPORT

OF

SPECIAL COMMITTEE ON LAW REFORM.

NOTE.—This presents the report of the Special Committee on Law Reform, as *amended and adopted* by the association August 3, 1893, and contains the provisions which the association directed to be presented to the State Legislature for adoption as laws, through a special committee of the association, consisting of Bev. B. Munford, S. S. P. Patteson, and R. L. Parrish, appointed by the president under the following resolution, as printed on page 62, *ante*, viz.:

Resolved, That the bills recommended by the Special Committee on Law Reform, as amended, be approved, and that the president of the association appoint a committee of three to present to and urge upon the General Assembly of Virginia the enactment into laws of the bills proposed in said report, but with power in said committee to make such changes in the phraseology of said bills as may be deemed expedient, provided the substance of the same is preserved.

To the Virginia State Bar Association:

We propose to amend section 3246 of the Code as follows:

I.

A BILL to amend and re-enact section 3246 of the Code of Virginia.

Be it enacted by the Senate and House of Delegates of Virginia, That section 3246 of the Code of Virginia be and the same is hereby amended and re-enacted so as to read as follows:

Section 3246. *When action not to abate for want of form.*—No action shall abate for want of form where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the case, *and in any action for the recovery of money due on contract, express or implied, it shall be sufficient for the*

declaration to describe plainly and with reasonable certainty the cause of action relied on, or if the contract be in writing, it shall be sufficient to file the same, or a copy thereof, with the declaration. The common counts, with a bill of particulars, may in any such case be made a part of the declaration. And no demurrer to such declaration shall be sustained because of the form of the action. In such case the writ may describe the action simply as an action on a contract.

NOTE.—The amendatory part is in *italics*. The effect of this amendment will be to make one personal action on contract, or the implied assumpsit, sufficient where three exist now. Thus in the action of assumpsit all the relief may be had on any cause of action as to which the pleader would now have to elect between assumpsit, debt and covenant. In this we are following the spirit of reform which led the Legislature to make one form of action for trespass and case, the advantage of which has been too obvious to need comment. A simplification, too, of the declaration as provided by the proposed amendment seems to us to secure all the advantages claimed for the bill of complaint provided by the code of procedure, while conciseness and brevity are perhaps better assured.

II.

A BILL to amend and re-enact section 3271 of the Code of Virginia.

Be it enacted by the Senate and House of Delegates of Virginia, That section 3271 of the Code of Virginia be and the same is hereby amended and re-enacted so as to read as follows:

Section 3271. *Form of demurrer or joinder in demurrer.*—The form of demurrer or joinder in demurrer *may* be as follows: "The defendant [or plaintiff] says that the declaration [or other pleading] is not [or is] sufficient in law. *All demurrers shall be in writing, and shall state specifically the grounds of demurrer relied on. And no grounds shall be considered other than those so stated, but either party may amend his demurrer by stating additional grounds, or otherwise, at any time before the trial.*"

NOTE.—The changes here made are in *italics*. The object of this amendment is to accomplish for a defence on grounds of law what the amendment proposed to section 3269 is expected to do for defences upon the facts. No idea of what the real objection in law is, is conveyed by the word "demurrer." We think that the defendant or the plaintiff, as the case may be, should be compelled to state his real defence in law.

III.

A BILL to repeal section 3267 of the Code of Virginia.

Be it enacted by the Senate and House of Delegates of Virginia, That section 3267 of the Code of Virginia be and the same is hereby repealed.

NOTE.—We cannot understand what possible difference it can make to the investigation of truth whether a traverse concludes to the country or with a verification. But such requirements do raise technical difficulties and ought to be abolished.

IV.

A BILL to amend and re-enact section 3286 of the Code of Virginia.

Be it enacted, That section 3286 of the Code of Virginia be and the same is hereby amended and re-enacted so as to read as follows:

Sec. 3286. When in any action on contract for the payment of money no plea in bar to be received, or inquiry of damages made, unless defendant file with plea affidavit denying plaintiff's claim, but judgment given therefor.

In *any action* on a contract, express or implied, for the payment of money (except where the process to answer the action has been served by publication), if the plaintiff file with his declaration an affidavit made by himself or his agent, stating therein, to the best of affiant's belief, the amount of the plaintiff's claim, that such amount is justly due, and the time from which the plaintiff claims interest, no plea in bar shall be received in the case, either at rules or in court, unless the defendant file with his plea the affidavit of himself, or his agent, that the plaintiff is not entitled, as the affiant verily believes, to recover anything from the defendant on such claim, or stating a sum certain less than that set forth in the affidavit filed by the plaintiff, which, as the affiant verily believes, is all that the plaintiff is entitled to recover from defendant on such claim.

If such plea and affidavit be not filed by the defendant, there shall be no inquiry of damages, but judgment shall be for the plaintiff for the amount claimed in the affidavit filed with his declaration.

If such plea and affidavit be filed, and the affidavit admits that the plaintiff is entitled to recover from the defendant a sum certain less than that stated in the affidavit filed by the plaintiff, judgment may be taken by the plaintiff for the sum so admitted to be due, and the case be tried as to the residue.

V.

A BILL to amend and re-enact section 3272 of the Code of Virginia.

Be it enacted by the Senate and House of Delegates of Virginia, That section 3272 of the Code of Virginia be and the same is hereby amended and re-enacted so as to read as follows:

Section 3272. *What defects not to be regarded on demurrer.*—On a demurrer (unless it be to a plea in abatement) the court shall

not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action or defence that judgment according to law and the very right of the cause cannot be given.

NOTE.—The amendment consists in omitting the residue of the section, which is rendered wholly useless by the amendment already proposed.

VI.

A BILL to simplify the mode of procedure in action[illegible] in suits in equity.

Be it enacted by the Senate and House of D[illegible]ginia:

1. That in every proceeding at law the principles of common law and equity shall be alike applicable, and the same relief shall be administered, so far as the nature of the proceeding will admit, but wherever the principles of law and equity conflict, the principles of equity shall prevail.

2. That whenever a suit is brought in equity, which should properly have been brought at law, the suit shall not, for that reason, be dismissed, but the court shall cause a jury to be empanelled frame an issue to be tried by them and give to their verdict the same force and effect as if the same had been brought at law. And whenever it shall appear to the court that the proper relief or the whole relief demanded and to which the party is entitled cannot be given in an action at law, according to the principles of equity applicable to the case, the suit shall not for that reason be dismissed, but leave shall be given to make such amendments as may be necessary to afford proper relief, and the court, without the aid of a jury, shall administer such relief as the parties ought to be entitled to if the same had been brought in equity.

3. Any case which may be at any time in the Chancery or Circuit Court of Richmond city, and subject to the provisions of section 1 or section 2 of this act, shall be transferred from the Circuit Court of said city to the Chancery Court, or from the Chancery Court of said city to the Circuit Court, as the case may be.

4. This statute shall be liberally construed, to the intent that justice be not delayed or denied by reason of the form of the proceeding.

NOTE.—The committee regard this statute of great importance as going far to supply two of the just demands of reform, that principles of equity shall be fully administered in all cases, whether their form be at law or in chancery, and that neither loss nor delay shall result from a mistake in the application to the proper forum. We can see no good reason for dismissing a good cause merely because the sufferer applied for relief at the

wrong door. Every reason of justice and right demands that he should be merely directed to the proper tribunal when such a mistake has been made. And if the form of the remedy, as at law, is too narrow or not supple enough to enable justice to be done upon principles of equity, we think the parties should at once have their cause transferred to that forum whose machinery is adequate to meet the ends of right and justice.

VII.

A BILL to amend and re-enact section 3267 of the Code of Virginia.

The section of the Code [illegible] (VII) section is 3269 instead of [illegible]

[illegible] and House of Delegates of Virginia [illegible] Code of Virginia be amended and re-enact[illegible] lows:

Section 3267. *Replicati[illegible] pleas.*—In any action the plaintiff may reply as many matters, whether of law or fact, to the defendant's plea as he may think necessary. There shall be no other traverse of any plea, or joinder of issue on the part of the plaintiff, than that the plaintiff "replies generally" to such plea, or words to that effect; and by such a traverse, or by going to trial without any traverse, the plaintiff shall be considered as controverting all the material allegations of the plea. But when the plaintiff relies upon new matter in answer to the plea he shall state the same specially in his replication in plain and concise language; and no evidence shall be received of any new matter which is not so stated. But when the plaintiff relies upon new matter to the plea he shall state the same specially in his replication in plain and certain language, and the defendant shall do the same when he relies upon new matter in answer to the new matter thus alleged by the plaintiff, and no evidence shall be received of any new matter which is not so stated.

NOTE.—The abolition of all forms of pleas, and hence of formal commencements and conclusions, as attempted in the committee's amendment to section 3269, seems to call for special provision as to the subsequent pleadings. Under the system now prevailing, the *conclusion* of the plea (*e. g.*, to the country or with a verification) determines the character of the replication, *i. e.*, whether it shall be a mere *similiter*, or whether it shall be special.

It seems to the committee that the present rule, which insists upon absolute singleness of issue in all pleadings subsequent to the plea, and therefore prohibiting a demurrer and a reply to the same plea, is unsatisfactory to the profession and should be abolished. The practice in the courts in allowing the same thing to be indirectly accomplished (as by motion to strike out the plea or the withdrawal of a demurrer before final judgment upon it, and then replying to the fact) indicates the necessity for a relaxation of the rule. It is the intention of the above amendment to allow the same latitude in respect to the replication as already exists in respect to pleas.

It is of first importance that the parties come to an issue as speedily as possible. Doubtless this consideration induced the courts to give such latitude to the plea of the general issue, in order to cut off subsequent pleadings, which not only prolonged the litigation, but frequently confused

the issues. The above amendment proposes to abolish all pleadings subsequent to the replication. Indeed, it practically dispenses with the replication itself, except where new matter is relied upon in answer to the plea, thus somewhat assimilating the procedure to the practice in chancery, where the general replication makes up the issue. When the plaintiff has set out his case at large in his declaration, and the defendant has in his plea stated his defence with equal clearness, as the amendment of section 3269 requires that he shall do, there is no practical need of a replication, save in setting up new matter.

Respectfully submitted,

S. S. P. PATTESON,
THOMAS S. MARTIN,
W. M. LILE,
R. T. BARTON,
J. R. TUCKER,
R. T. W. DUKE,
Committee.

MEMORIALS.

WILLIAM W. GORDON.

Since the last meeting of the Bar Association of Virginia a bolt has fallen in our midst which reached the brightest one amongst us, and struck down our best beloved companion and friend; the brightest legal mind, the warmest heart, the purest life, the most generous friend, the knightliest gentleman in our ranks, Colonel William W. Gordon, of the Richmond Bar.

Though lost to us by a mysterious Providence, to which we must bow in humble submission, yet he is not lost to memory, but dear through a thousand sacred recollections. We recall him in the light of innumerable pleasing associations which will ever keep his name and noble characteristics to us as a green and fadeless memory.

Colonel Gordon was a native Virginian, born on the banks of the beautiful Rappahannock river, in the county of Essex, in Eastern Virginia, at the home of his parents, in the town of Tappahannock. With his earliest breath he was inspired with all those principles which exemplify and adorn Virginia's name and character. From his cradle he was a typical Virginian. Educated by his father, who was a man of letters and of extensive attainments, he early exhibited that love of letters and devotion to truth and honor which pointed with prophetic hand to his future shining career. Educated at the Virginia Military Institute, where he graduated with distinction, after some years of public service as Professor in his Alma Mater, and later in the United States Coast Survey, he began the study of the law in the University of Virginia, where, although delicate in body and troubled at that period of his life with weak eyes, he brought to bear his wonderful powers of memory which distinguished him through life, maintained the lead among his classmates, and bore off the honors of his class, and left the University perhaps the best equip-

ped lawyer of his age in the State. He returned to his native county and began a career there at the bar which brought him fame in the very morning of his professional career. Subsequently he settled in Greenbrier county and entered upon a career at the bar at Lewisburg, the place of session in those days of the Virginia Court of Appeals, and quickly, as the law partner of the Hon. William Smith (a distinguished and successful lawyer), he stepped into the front rank of the profession among the members of the famous bar of that locality. And an inspection of the reports of the Court of Appeals of that period shows that he was already abreast of the leaders of that bar. But the war breaking out, the reverberations of the first guns had scarcely awoke the echoes of the startled nation, when he was marching to the east at the head of a gallant band of dragoons, composed of the true sons of Greenbrier, to confront the enemies of his native State on the borders of her sacred soil; and shortly after (shoulder to shoulder with the heroic sons of his native Essex under the lead of the lamented Captain Latane, the companion of his boyhood, with his brave mountaineers), he answered the Confederate roll-call on the banks of the Potomac.

But he was not destined to win his knightly spurs in the cavalry of the immortal Ashby. Governor John Letcher, the war Governor of Virginia, himself a citizen of Lexington, living under the shadow of the dome of the Military Institute, who knew the distinguished career at that place of this young captain, commissioned him colonel of the newly organized Twenty-seventh Virginia Infantry, which, within a few weeks, was destined to form part of that "Stonewall" at Manassas upon which the tide of Federal invasion rolled in vain, and which gave to its immortal commander his war name, so dear to Virginians, so terrible to her enemies, so familiar to and so honored by the civilized world.

Here he won praise from Stonewall Jackson, and was crowned with laurels; and Colonel Gordon, of the "Stonewall Brigade," would never have been forgotten by Virginians if he had never returned to his beloved profession. But his naturally delicate constitution was unequal to the hardships of a soldier's life. He grew too weak to sit his horse, and refusing to retire, he was re-

moved by his brother's hands, by command of the general, from the back of his battle-steed to a couch of suffering.

The war over, a cloud rested on his home in Greenbrier, under the shadow of which his fine law library had been carried away, and the iron hand was upon the courts and the law, and Colonel Gordon returned there no more to make his home. He settled in the county of New Kent, where he had relatives, and was soon surrounded by a host of old friends and new. Upon the restoration of the courts he began the practice of law in the city of Richmond, retaining his residence in New Kent, which is situated a short distance east of Richmond. In 1877 he removed to that city, where he resided until the time of his death, which occurred on the 5th of December, 1892.

His professional career as a member of the Richmond Bar was one of the most remarkable in our history, and extended over a large area; in every branch of the practice. His success was unparalleled. His matured mind was conceded to be the brightest among all his illustrious associates, which, once turned upon any subject, illumined it as with a shaft of light which dissipated all obscurities, settled all controversies. And these results, recognized of all men, were regarded as the effects of genius; and it came to be the remark of the ablest legal minds that Colonel Gordon was possessed of a genius for law. Under the light of his luminous mind all uncertainties or intricacies of legal questions disappeared as shadows before the light.

In debate he was so clear, urbane and courteous that he disarmed all resentments; the touch of envy or jealously never came near him; and opponents vied with his colleagues in speaking kindly words of admiration and praise. His success left no sting. He could not be employed to advocate the wrong, but always stood for the right. As the counsel for great corporations he guided vast interests with the broadest wisdom and the most consummate skill, and no man of his time contributed more to the development of the resources of his native State and to the advancement of her material prosperity; and he has been called away in the very zenith of his usefulness and broadened influence.

But his achievements were not the result solely of his genius; he knew and loved the books of the law, and was familiar with

all the great authors, and the decisions of the courts of last resort in this country, although he never read books in court. He studied closely and laboriously every subject, and never entered upon any discussion without the fullest preparation; his memory was such that he never forgot anything, and the lapse of time never obscured his recollection, and he spoke in the language of the great authors and great judges. And when challenged to produce authorities, as he seldom was, he gently but promptly overwhelmed such opponents with an unanswerable array of authority, and showed that—

"The heights by great men reached and kept
Were not attained by sudden flight,
But they, while others slept,
Were toiling upward in the night."

Once embarked in investigations, the hours of the night were as those of the day; and his custom was to turn the leaves of the law into the silent small hours, never leaving a task unfinished, however his delicate frame drooped or the lofty brow throbbed.

Remarkable as was his professional career, it is to the noble qualities of his heart that must be ascribed the warm place he held in the hearts of his fellow-men. His goodness of heart was known to all, and none came within its sphere but felt and owned its magic power. And it was, and is, a common saying of him that "his heart was larger than his head." He delighted and joyed in doing a good deed, and he was always happy in extending his kind sympathies and stretching forth his unstinted beneficence. In his home his life was peculiarly sunshiny and joyous; with his beloved wife and beautiful children it was delightful to see him, all brightness and sunshine. His love of his family was like a romance, and all who came within its sphere were charmed into happiness. When bereavements came—and his life was not without them—and his children were torn from his bosom, it was a greivous sight to see his bowed frame and crushed and broken spirit, which was brought to the verge of the grave by the burden of dumb grief.

But this beautiful life is ended; his eloquent voice is stilled forever; his heart will beat no more with love or grief; his noble form is in the silent grave, sleeping amid his beloved ones who

have gone before, upon the banks of the rolling James, in that beautiful city of the dead down in Richmond, where it will await the resurrection morn. We are left to mourn his loss, and we will cherish his memory and endeavor to imitate his illustrious life; and we deem it fit to put in lasting form upon our records a tender memorial of our departed friend. Therefore be it

Resolved, That in the death of Col. W. W. Gordon we lament the loss of one beloved by us all, and in whom we recognize the brightest ornament to our profession and to this Bar Association of Virginia; that while his loss we deplore, we will forever cherish his memory as a sacred possession.

Resolved, That we tender to his bereaved widow and his fatherless children our heartfelt sympathy, with the trust that they may find some solace in contemplation of the bright life which was his, and in the hope of the re-union which awaits them in the land of light beyond the silent river.

Resolved, That a copy of these resolutions be spread upon the records of this association, be sent to the family of the deceased, and published in the "Virginia Law Journal," and the newspapers of Virginia be requested to publish them.

LEGH R. PAGE.*

We are here to bear testimony of the worth and the excellence of Major Legh R. Page as a just lawyer, who followed the exalted traditions of the bar of this State with unfaltering step, and to signify our admiration of his character as a faithful citizen and devoted son of Virginia.

In his early manhood he began his professional life in the State of Mississippi, and soon attained a prominent position at the bar of that State.

Upon the breaking out of the war he entered the service of the Confederacy, and followed its fortunes to the end with patriotic zeal. Being an officer in the department of the adjutant-general at the close of the war, he remained in the city of Richmond, and, as soon as the courts were reëstablished, came to that

*This paper was prepared by Judge W. W. Crump and adopted by a meeting of the bar held at Richmond, and readopted by the Virginia State Bar Association as explained by Mr. James Pleasants. (*See Minutes, page* 47.)

bar, where he pursued till his death his career as a most conspicuous and eminent lawyer.

He speedily took his place in the very foremost rank of the profession.

His tireless industry and indomitable energy, his profound knowledge of the philosophy of jurisprudence, his remarkable familiarity with legal principle and precedent won for him a reputation alike widespread and solid, second to no lawyer in the Commonwealth of Virginia.

As an advocate his powerful intellect and well-disciplined mind, his tenacity of purpose and deep conviction gave a prodigious force to his terse and luminous statement and to his clear, compact and logical reasoning, and won for him the highest forensic success. He wasted no time in word-painting. His vigórous thought was clothed in apt language and in precise and polished phrase. Though widely read in general learning and literature, and with an exquisite and discriminating taste in classical lore, he rarely employed them. The impetuous force of his argumentative power rendered mere verbal ornamentation superfluous and useless. His eloquence was real, the result of thorough study and profound thought.

He understood and practiced the ethics and amenities of the bar with the scrupulous care of the true lawyer.

Frank, courteous, and manly, he was guided by the sententious precept of the great jurist in remembering that "the weapon of the advocate is the sword of the soldier, and not the dagger of the bandit."

As a counselor he had no superior. His broad mental horizon, his ample legal acquirements, his candor—wise discernment and sound judgment united to an instinctive sense of justice and right—a knowledge of mankind and a large experience in the affairs of life gave to his opinions and advice a weight and strength alike convincing and conclusive.

His advice was eagerly sought and implicitly followed in matters of great moment, involving the highest and most important interests.

Of his gentler virtues, his warmth of disposition, his steadfastness in friendship, his nice sense of honor, his generous hand

and genial temper, we who knew him best know how he abounded in them all, and we shall lament his loss with genuine grief and inscribe his memory in our hearts. Be it, therefore,

Resolved, That in the death of Major Legh R. Page, the bar has been deprived of one of its most valued and eminent members, whose upright life and high achievements imparted luster and honor to our noble profession, and whose example deserves our study and meditation.

Resolved, 2. That we tender to the family of the deceased our sincere and heartfelt sympathy in their bereavement, and that the secretary forward to them a copy of these proceedings.

ALEXANDER DIXON PAYNE.

Since the last meeting of this association we have lost by death one of our distinguished members—Captain Alexander Dixon Payne—whose life of purity and strength challenges admiration and shines as an example we would follow. From early youth to the end, no word or act was said or done by him for which there was ever cause for regret. From his *Alma Mater*, William and Mary College, with the first honors of his class, he pursued a course of law under Prof. John B. Minor at the University of Virginia, and was admitted to practice at Warrenton, Fauquier county. The Warrenton Bar was unusually distinguished, but he was rapidly rising to the front when the bugle sound was heard and the call to arms. Never backward at duty's call, Captain Payne closed his books, buckled on his sword and rushed to the front with the now far-famed "Black Horse Cavalry." He rode and fought with Stuart and Hampton, Johnston, Jackson and Lee. With the legend on his saddle, "Manassas and Appomattox," he always led his men, never followed.

With steady bravery and duty fully done, he rose in rank, and at the close of the war was in command of that glorious company whose leaders had been Major John Scott, General William H. Payne and Colonel Robert Randolph. When the rush of battle ceased, the clash of arms was stilled, and his cause was lost, Captain Payne returned to his home and resumed the practice of

the law. As a lawyer he was broad, deep, accurate and of wonderfully sound judgment. He seemed to discern the right intuitively and never wavered in maintaining it. He loved right and abhorred wrong. To uphold the one and put down the other he never faltered. A great soldier, a splendid lawyer, as a man he was supreme. He was purity itself. No slur or suspicion could approach him; it would have been consumed in the furnace of his uprightness. Truth was his emblem. He loved it; he lived it. In his home greater love than his no family ever had. To his friends he was sincere and true as steel. No private ambition could come between them and him. He was for them and them only; no self was ever seen. In a convention in his district Captain Payne strove for the nomination for Congress, of his friend, General William H. F. Lee. A dead-lock came. Again and again General Lee was within a few votes of the two-thirds required. Vote after vote but intensified the feeling. Bitterness came. As the only solution the opposition tendered the nomination to Captain Payne. General Lee begged him to accept and end the bitterness. Nothing could move him. Captain Payne rose from his seat, and fire almost flashed from his eyes as he cried: "I would sooner cut off my right arm than accept. I am for General Lee; no one else."

All appeal to him was in vain. He stood to his purpose as firm as the rock of Gibraltar. Such was the man, such the life. When the angel of death knocked at his door he was ready. There was never a time in his life when he was unprepared. Skilled physicians told him there was no hope. Calmly he went to his dear home, and for several months lay waiting the call. He never complained, never murmured. He kept his sufferings sealed to himself, and when the end came passed away like a child into gentle sleep. To know how much he was loved, honored and revered as a man and a soldier, one need only have seen that great gathering of friends and battle-scarred warriors, who came from far and near and followed his remains gently, tenderly and in tears, to the grave.

Resolved, 1. That in the death of Captain Alexander Dixon Payne this association has lost a loved and valued member, the

bar a pure, skilled and able counsel, and the State a tried, trusted and truly patriotic son.

2. That a copy of these resolutions be sent to his family, and published in the *Virginia Law Journal.*

JOHN W. STOUT.

Be it resolved, That this association has, with profound regret, received information of the death of Judge John W. Stout, of Augusta county.

In the death of Judge Stout this association has lost one of its most valued members, and the State one of her ablest and most upright judges. Born, raised and educated in Augusta county, Judge Stout completed his education and his professional studies at the University of Virginia. He came to the bar in 1875, and soon took a high rank among the best young lawyers of his day. In 1885 he was elected judge of his native county to fill the unexpired term of Judge Hudson. He was re-elected for a regular term in 1888 and again in 1892, and was serving his second regular term with distinguished ability when, in December, 1892, his most promising career was cut short by an untimely death.

During the years that Judge Stout sat upon the bench he exhibited the most marked and unusual ability for judicial position. His mind was singularly clear, and he seemed to be an utter stranger to anything like confusion of thought. He possessed the rare quality of being able to see at once the real gist and point of every question presented to him, brushing aside all collateral and immaterial matters, which so frequently confuse and mislead others. He was of a most kindly and gentle disposition. He heard with patience and attention every argument addressed to him, and never failed to consider carefully every point presented. His courtesy was uniform. He was always considerate of others' feelings, and, while he was firm and decided, he was never harsh or unkind.

As to his ability and impartiality, it is only necessary to say that, though he presided for years over one of the largest and most populous counties in the State, he not only was never reversed, but never had but one decision appealed from.

In his death our profession will mourn the loss of a member who reflected honor and credit upon it; his county, of a most valuable and progressive citizen, and his personal friends of a beloved companion whose place it will be difficult to fill.

Resolved further, That the sincere sympathy of this association be tendered to his bereaved family, and that a copy of these resolutions be sent to them and be published in the proceedings of this meeting and in the "Virginia Law Journal."

FORMER PRESIDENTS.

WM. J. ROBERTSON,
1888–'89.

R. G. H. KEAN,
1889–'90.

EDWARD C. BURKS,
1890–'91.

J. RANDOLPH TUCKER,
1891–'92.

RO. T. BARTON,
1892–'93.

OFFICERS AND STANDING COMMITTEES.

1893-1894.

OFFICERS.

President.

WALLER R. STAPLES,

Vice-Presidents.

R. R. HENRY (SOUTHWEST), GEORGE McINTOSH (TIDEWATER), JAS. P. HARRISON (SOUTHSIDE), R. WALTON MOORE (PIEDMONT), JOHN J. WILLIAMS (VALLEY).

Secretary and Treasurer.

JACKSON GUY.

Executive Committee.

FRANK H. McGUIRE, (CHAIRMAN), GEORGE W. MORRIS, EUGENE C. MASSIE, MARSHALL HANGER, WILLIAM J. LEAKE, RICHARD B. DAVIS.

STANDING COMMITTEES.

(*Names in the Order of the Judicial Circuits.*)

Admissions.

First Circuit	THOMAS H. WILLCOX	Norfolk.
Second Circuit	PHIL. V. COGBILL	Chesterfield C. H.
Third Circuit	T. N. WILLIAMS	Clarksville.
Fourth Circuit	H. R. MILLER	Danville.
Fifth Circuit	H. D. FLOOD	Appomattox C. H.

Sixth Circuit	JOHN W. FISHBURNE, Secretary	Charlottesville.
Seventh Circuit	A. W. PATTERSON	Richmond.
Eighth Circuit	E. E. MONTAGUE	Hampton.
Ninth Circuit	W. W. WOODWARD	Saluda.
Tenth Circuit	HILL CARTER	Ashland.
Eleventh Circuit	J. K. M. NORTON	Alexandria.
Twelfth Circuit	E. E. STICKLEY	Woodstock.
Thirteenth Circuit	ALEX. F. ROBERTSON	Staunton.
Fourteenth Circuit	J. H. H. FIGGAT	Fincastle.
Fifteenth Circuit	R. R. HENRY	Tazewell.
Sixteenth Circuit	SAMUEL V. FULKERSON	Bristol.
Seventeenth Circuit	R. T. IRVINE	Big Stone Gap.
Eighteenth Circuit	W. O. HARDAWAY	Roanoke.

Legislation and Law Reform.

First Circuit	L. D. STARKE	Norfolk.
Second Circuit	WM. P. MCRAE	Petersburg.
Third Circuit	GEORGE J. HUNDLEY	Amelia C. H.
Fourth Circuit	JAMES P. HARRISON	Danville.
Fifth Circuit	FRANK NELSON	Rustburg.
Sixth Circuit	WILLIAM B. PETTIT	Palmyra.
Seventh Circuit	B. RAND WELLFORD	Richmond.
Eighth Circuit	R. L. HENLEY	Williamsburg.
Ninth Circuit	JOHN B. DONOVAN	Mathews C. H.
Tenth Circuit	WILLIAM A. LITTLE, JR.	Fredericksburg.
Eleventh Circuit	EPPA HUNTON, JR.	Warrenton.
Twelfth Circuit	M. L. WALTON	Woodstock.
Thirteenth Circuit	R. W. WINBORNE	Buena Vista.
Fourteenth Circuit	JOHN R. JOHNSON	Christiansburg.
Fifteenth Circuit	J. W. CHAPMAN	Tazewell C. H.
Sixteenth Circuit	B. F. BUCHANAN	Marion.
Seventeenth Circuit	O. M. VICARS	Wise C. H.
Eighteenth Circuit	S. GRIFFIN	Bedford City.

Judiciary.

First Circuit	E. E. HOLLAND	Suffolk.
Second Circuit	WILLIAM R. MCKENNEY	Petersburg.
Third Circuit	THOMAS M. MILLER	Powhatan C. H.
Fourth Circuit	P. H. DILLARD	Rocky Mount.
Fifth Circuit	WILLIAM V. WILSON, JR.	Lynchburg.
Sixth Circuit	JOHN G. WILLIAMS	Orange C. H.
Seventh Circuit	JOHN HUNTER, JR.	Richmond.
Eighth Circuit	JAMES H. FLETCHER, JR.	Accomack C. H.
Ninth Circuit	LLOYD T. SMITH	Heathsville.
Tenth Circuit	F. W. SIMS	Louisa.

Eleventh Circuit	R. TAYLOR SCOTT	Warrenton.
Twelfth Circuit	MARSHALL MCCORMICK	Berryville.
Thirteenth Circuit	R. L. PARRISH	Covington.
Fourteenth Circuit	A. A. PHLEGAR	Christiansburg.
Fifteenth Circuit	JOHN H. FULTON	Wytheville.
Sixteenth Circuit	JAMES L. WHITE	Abingdon.
Seventeenth Circuit	R. A. AYERS	Big Stone Gap.
Eighteenth Circuit	M. P. BURKS	Bedford City.

Grievances.

First Circuit	R. S. THOMAS	Smithfield.
Second Circuit	ALEX. HAMILTON	Petersburg.
Third Circuit	A. D. WATKINS	Farmville.
Fourth Circuit	L. C. BERKELEY, JR.	Danville.
Fifth Circuit	F. P. CHRISTIAN	Lynchburg.
Sixth Circuit	FRANK A. MASSIE	Charlottesville.
Seventh Circuit	A. B. GUIGON	Richmond.
Eighth Circuit	W. J. NELMS	Newport News.
Ninth Circuit	JOHN A. PALMER	Kilmarnock.
Tenth Circuit	FRANK V. WINSTON	Louisa.
Eleventh Circuit	J. B. MCCABE	Leesburg.
Twelfth Circuit	H. H. DOWNING	Front Royal.
Thirteenth Circuit	GEORGE M. HARRISON	Staunton.
Fourteenth Circuit	E. J. BRUGH	Fincastle.
Fifteenth Circuit	S. C. GRAHAM	Tazewell.
Sixteenth Circuit	F. B. HUTTON	Abingdon.
Seventeenth Circuit	C. T. DUNCAN	Jonesville.
Eighteenth Circuit	JOHN B. GOODE	Roanoke.

Legal Education and Admission to the Bar.

First Circuit	WILLIAM A. FENTRESS	Portsmouth.
Fifth Circuit	JAMES LEWIS ANDERSON	Richmond.
Seventh Circuit	WILLIAM M. LILE	University of Va.
Eleventh Circuit	C. E. NICOL	Brentsville.
Eighteenth Circuit	WILLIAM A. GLASGOW, JR.	Roanoke.

Library and Legal Literature.

First Circuit	ROBERT M. HUGHES	Norfolk.
Fifth Circuit	R. G. H. KEAN	Lynchburg.
Sixth Circuit	R. T. W. DUKE, JR.	Charlottesville.
Seventh Circuit	B. T. CRUMP	Richmond.
Eighteenth Circuit	J. ALLEN WATTS	Roanoke.

MEMORANDUM

OF

SUBJECTS REFERRED TO COMMITTEES.

The bill which was reported to the association in 1889 affecting admission to the bar. *Minutes*, p. 46.

Referred to the Committee on Legal Education and Admission to the Bar, with request that it present the same to the Legislature.

The bills recommended by the Special Committee on Law Reform, as amended and adopted. *Minutes*, p. 62.

Referred to a Special Committee consisting of B. B. Munford, S. S. P. Patteson and R. L. Parrish.

ROLL OF MEMBERS.

1893.

ACTIVE.

Aiken, A. M., ... Danville.
Alexander, J. A., ... Staunton.
Allyn, J. T., ... Norfolk.
Anderson, Archer Jr., ... Richmond.
Anderson, George K., ... Clifton Forge.
Anderson, James L., ... Richmond.
Anderson, Samuel A., ... Martinsville.
Anderson, William A., ... Lexington.
Armstrong, A. W., ... Alexandria.
Ayers, Rufus A., ... Big Stone Gap.
Aylett, Lewis D., ... Charlottesville.
Baker, Richard H., ... Norfolk.
Barbour, Philip P., ... Gordonsville.
Barham, T. J., ... Newport News.
Barley, Louis C., ... Alexandria.
Barr, Frank T., ... Abingdon.
Barret, Benjamin T., ... Richmond.
Barton, D. Jenifer, ... Richmond.
Barton, James J., ... Covington.
Barton, Robert T., ... Winchester.
Beach, S. Ferguson, ... Alexandria.
Bell, R. P., ... Staunton.
Berkeley, Landon C., Jr., ... Danville.
Berkeley, W. W., ... Roanoke.
Bernard, George S., ... Petersburg.
Bibb, W. E., ... Roanoke.
Bickford, R. G., ... Newport News.
Blackford, Charles M., ... Lynchburg.
Blackstone, J. W. G., ... Accomack C. H.
Blair, F. S., ... Wytheville.
Blair, John C., ... Wytheville.
Bolling, William H., ... Wytheville.
Bouldin, Wood, Jr., ... Houston.

Boulware, A. L., ... Richmond.
Bowler, James, ... Covington.
Boykin, R. E., ... Smithfield.
Braxton, A. C., ... Staunton.
Braxton, Carter, ... Staunton.
Britt, Lee, ... Suffolk.
Brooke, James V., ... Warrenton.
Brown, R. M., ... Pulaski.
Browning, James S., ... Tazewell.
Brugh, E. J., ... Fincastle.
Bryan, Joseph, ... Richmond.
Buchanan, B. F., ... Marion.
Buchanan, John A., ... Abingdon.
Bullitt, J. F., Jr., ... Big Stone Gap.
Bumgardner, James, Jr., ... Staunton.
Bumgardner, J. Lewis, ... Staunton.
Burks, Edward C., ... Bedford City.
Burks, M. P., ... Bedford City.
[illegible]
Burns, Wm E., ... Lebanon.
[illegible], C., Jr., ... Danville.
Campbell, A. A., ... Wytheville.
Campbell, J. Lawrence, ... Bedford City.
Cardwell, Richard H., ... Hanover C. H.
Carrington, Edward W., ... Richmond.
Carter, Hill, ... Ashland.
Carter, John W., ... Martinsville.
Carter, Thomas N., ... Richmond.
Caskie, G. E., ... Lovingston.
Caskie, James, ... Richmond.
Catlet, Robert, ... Lexington.
Caton, James R., ... Alexandria.
Chalkley, Lyman, ... Covington.
Chalmers, A. Emmet, ... Richmond.
Chancellor, S. Carroll, ... Leesburg.
Chapman, J. W., ... Tazewell.
Christian, Frank P., ... Lynchburg.
Christian, Frank W., ... Richmond.
Christian, George L., ... Richmond.
Christian, Thomas D., ... Lynchburg.
Clarke, William B., ... Surry C. H.
Claytor, Graham, ... Bedford City.
Cochran, George M., Jr., ... Staunton.
Cocke, Charles L., ... Sussex C. H.
Cocke, Lucien H., ... Roanoke.

Cocke, Preston,	Richmond.
Cogbill, Philip V.,	Chest'field C. H.
Coke, John A.,	Richmond.
Coleman, J. T.,	Lovingston.
Collier, Charles F.,	Petersburg.
Compton, W. B.,	Harrisonburg.
Conrad, Holmes,	Winchester.
Cosby, William W., Jr.,	Richmond.
Crocker, James F.,	Portsmouth.
Crump, Bev. T.,	Richmond.
Crumpler, R. C.,	Suffolk.
Cutchins, Sol,	Richmond.
Dabney, W. D.,	Charlottesville.
Daniel, James R. V.,	Richmond.
Daniel, John W.,	Lynchburg.
Davis, Richard B.,	Petersburg.
Delaney, John T.,	Covington.
Dennis, Geo. E.,	Rocky Mount.
DeSaussure, William P.,	Richmond.
Dillard, P. H.,	Rocky Mount.
Dinneen, John H.,	Richmond.
Donovan, John B.,	Mathews C. H.
Doswell, Stonewall J.,	Richmond.
Downing, H. H.,	Front Royal.
Duke, R. T. W.,	Charlottesville.
Duke, R. T. W., Jr.,	Charlottesville.
Duke, W. R.,	Charlottesville.
Duncan, C. T.,	Jonesville.
Echols, Edward,	Staunton.
Edmunds, James E.,	Lynchburg.
Elder, Thomas C.,	Staunton.
Ellett, Tazewell,	Richmond.
Ewell, John C.,	Millenbeck.
Farrar, F. R.,	Deatonsville.
Farrar, S. L.,	Amelia C. H.
Fauntleroy, R. R.,	Richmond.
Fentress, W. A.,	Portsmouth.
Figgat, J. H. H.,	Fincastle.
Finch, Geo. B.,	Boydton.
Fishburne, John W.,	Charlottesville.
Fitzgerald, J. P.,	Farmville.
Fletcher, James H., Jr.,	Accomack C. H.
Flood, H. D.,	Appom'tox C. H.
Folk, W. L.,	Smithfield.
Franklin, W. C.,	Pamplin City.

Fulkerson, Sam'l Vance, ... Bristol.
Fulton, E. M., ... Wise C. H.
Fulton, John H., ... Wytheville.
Gaines, Grenville, ... Warrenton.
Garnett, Theodore S., ... Norfolk.
Garnett, W. H. . . . . Manchester.
Garrett, A. C., ... Newport News.
Gillespie, A. P., ... Tazewell.
Gilmer, Frank, ... Charlottesville.
Glasgow, Frank T., ... Lexington.
Glasgow, Joseph A., ... Staunton.
Glasgow, Wm. A., ... Lexington.
Glasgow, Wm. A., Jr., ... Roanoke.
Gooch, W. S., ... Roanoke.
Good, D. S., ... Roanoke.
Goode, John, ... Bedford City.
Goode, John B., ... Bedford City.
Goodwyn, W. S., ... Hicksford.
Gordon, A. C., ... Staunton.
Gordon, James L., ... Charlottesville.
Gordon, Mason, ... Charlottesville.
Graham, Samuel C., ... Tazewell.
Grattan, Charles . . . . Staunton.
Grattan, George G., ... Harrisonburg.
Graveley, W. H. Martinsville.
Graves, Charles A., ... Lexington.
Gray, A. A., ... Palmyra.
Green, Berryman, ... Danville.
Green, Chas. T., ... Warrenton.
Green, Jno., ... Hillsville.
Green, Nathaniel T., ... Halifax C. H.
Gregory, Roger, ... Richmond.
Griffin, Samuel, ... Bedford City.
Guigon, A. B., ... Richmond.
Guy, Jackson, ... Richmond.
Hackler, J. W., ... Independence.
Haden, Benj., ... Fincastle.
Hagan, Patrick . . . . Clinch.
Hamilton, Alexander . . . . Petersburg.
Hanckel, Lewis T., ... Charlottesville.
Hanger, Marshall, ... Staunton.
Hardaway, W. O., ... Roanoke.
Harris, John T., Jr., ... Harrisonburg.
Harris, W. W. H., ... Lynchburg.
Harrison, George M., ... Staunton.

HARRISON, JAMES P., ... Danville.
HARRISON, RANDOLPH, ... Lynchburg.
HASKINS, MEADE, ... Richmond.
HATHAWAY, HOWARD, ... White Stone.
HATTON, G., ... Portsmouth.
HAW, GEORGE P., ... Richmond.
HAY, JAMES, ... Madison C. H.
HAYTHE, JOHN G., ... Buena Vista.
HAYTHE, MADISON H., ... Buena Vista.
HEATH, JAMES E., ... Norfolk.
HENLEY, R. L., ... Lightfoot.
HENRY, R. R., ... Tazewell.
HENRY, WM. WIRT, ... Richmond.
HICKS, R. RANDOLPH, ... Roanoke.
HOBSON, J. R. A., ... Lexington.
HOLLADAY, A. L., ... Richmond.
HOLLAND, E. E., ... Suffolk.
HOLLAND, W. S., ... Windsor.
HOPKINS, W. S., ... Lexington.
HUBARD, J. L., ... Norfolk.
HUGHES, FLOYD, ... Norfolk.
HUGHES, ROBERT M., ... Norfolk.
HUNDLEY, GEORGE J., ... Amelia C. H.
HUNTER, JOHN JR., ... Richmond.
HUNTON, EPPA, ... Warrenton.
HUNTON, EPPA, JR., ... Warrenton.
HUTTON, F. B., ... Abingdon.
INGRAM, JOHN H., ... Manchester.
IRVINE, R. T., ... Big Stone Gap.
JACKSON, E. H., ... Front Royal.
JACKSON, G. CARLTON, ... Richmond.
JACKSON, JOHN, ... Richmond.
JACKSON, ROBT. C., ... Independence.
JAMES, B. O., ... Richmond.
JAMES, R. A., ... Danville.
JAMES, RICHARD D., ... Three Square.
JENKINS, JOHN B., ... Norfolk.
JOHNSON, JOHN R., ... Christiansburg.
JOHNSTON, JAMES D., ... Roanoke.
JONES, STURGES E., ... Roanoke.
JONES, WM. A., ... Warsaw.
KEAN, R. G. H., ... Lynchburg.
KELLEY, JOS. L., ... Big Stone Gap.
KEMPER, CHAS. E., ... Staunton.
KER, RICHARD S., ... Staunton.

Kerr, Jas. A.,	Norfolk.
Kilby, Wilbur J.,	Suffolk.
King, A. E.,	Roanoke.
Kinney, Thomas C.,	Staunton.
Kirkpatrick, Thos. J.,	Lynchburg.
Lassiter, Chas. T.,	Petersburg.
Lassiter, Francis Rives,	Petersburg.
Leake, A. K.,	Goochland.
Leake, Wm. J.,	Ashland.
Letcher, Greenlee D.,	Lexington.
Letcher, S. H.,	Lexington.
Lewis, John H.,	Lynchburg.
Liggett, Winfield,	Harrisonburg.
Lile, Wm. M.,	University.
Little, William A., Jr.,	Fredericksburg.
Logan, Robert H.	Salem.
Long, A. R.,	Lynchburg.
Lunsford, Wm.,	Roanoke.
Lyons, James,	Richmond.
Mann, Bernard,	Petersburg.
Mann, John	Petersburg.
Mann, William H.,	Nottoway C. H.
Manson, Nathaniel C., Jr.,	Lynchburg.
Marbury, Leonard,	Alexandria.
Marshall, Richard C.,	Portsmouth.
Martin, M. M.,	Richmond.
Martin, Thomas S.,	Scottsville.
Mason, George,	Petersburg.
Massie, Eugene C.,	Richmond.
Massie, Frank A.,	Charlottesville.
Massie, N. H.,	Danville.
Mathews, Wm. S.,	Big Stone Gap.
Maury, L. Turner,	Big Stone Gap.
May, S. D.,	Tazewell.
McAllister, J. T.,	Warm Springs.
McAllister, W. M.,	Warm Springs.
McCabe, J. B.,	Leesburg.
McCormick, Marshall,	Berryville.
McCue, J. Samuel,	Charlottesville.
McDowell, H. C., Jr.,	Big Stone Gap.
McGuire, Francis H.,	Richmond.
McHugh, C. A.,	Roanoke.
McIlwaine, William B.,	Petersburg.
McIntosh, George,	Norfolk.
McIntyre, R. A.,	Warrenton.

McKenney, Wm. R., ... Petersburg.
McRae, W. P., ... Petersburg.
Meredith, Chas. V., ... Richmond.
Meredith, Wyndham R., ... Richmond.
Miller, Henry R., ... Danville.
Miller, Thomas M., ... Powhatan C. H.
Miller, Thomas W., ... Roanoke.
Miller, W. T., ... Big Stone Gap.
Minor, Edmund C., ... Richmond.
Minor, John B., ... University of Va.
Minor, Raleigh C., ... Richmond.
Moncure, Wm. A., ... Richmond.
Montague, A. J., ... Danville.
Montague, E. E., ... Hampton.
Montague, Hill, ... Richmond.
Monteiro, A. X., ... Goochland C. H.
Moon, John B., ... Charlottesville.
Moon, F. C., ... Scottsville.
Moore, David E., ... Lexington.
Moore, Jas. E., ... Pulaski City.
Moore, R. Walton, ... Fairfax C. H.
Morris, George W., ... Charlottesville.
Morton, James W., ... Orange C. H.
Mullen, J. M., ... Petersburg.
Munford, Beverly B., ... Richmond.
Murdaugh, C. W., ... Portsmouth.
Murrell, Wm. M., ... Rustburg.
Mushbach, George A., ... Alexandria.
Nash, Benj. H., ... Richmond.
Nelms, W. J., ... Newport News.
Nelson, Frank, ... Rustburg.
Nelson, John H., ... Leesburg.
Nelson, R. E. R., ... Staunton.
Newman, E. D., ... Woodstock.
Newton, Willoughby, Jr., ... Richmond.
Nichols, Edward, ... Leesburg.
Nicol, C. E., ... Brentsville.
Norton, J. K. M., ... Alexandria.
Old, William W., ... Norfolk.
Page, Chas. L., ... Manchester.
Page, John . . . . Beaver Dam.
Page, R. M., ... Abingdon.
Page, Rosewell, ... Richmond.
Page, Thomas N., ... Richmond.
Parker, J. C., ... Franklin.

Parrish, R. L., ... Covington.
Patrick, William, ... Staunton.
Patterson, Archer W., ... Richmond.
Patteson, Camm, ... Repton.
Patteson, S. S. P., ... Richmond.
Payne, William H., ... Warrenton.
Pegram, Richard G., ... Richmond.
Pender, W. D., ... Norfolk.
Pendleton, Edmund, ... Lexington.
Pendleton, E. M., ... Lexington.
Penn, John E., ... Roanoke.
Perkins, George, ... Charlottesville.
Pettit, Paul, ... Palmyra.
Pettit, Pembroke, ... Palmyra.
Pettit, William B., ... Palmyra.
Phlegar, Archer A., ... Christiansburg.
Pickrell, John, ... Richmond.
Pierce, W. M., ... Christiansburg.
Pinner, John B., ... Suffolk.
Pleasants, James, ... Richmond,
Pollard, H. R., ... Richmond.
Portlock, William N., ... Norfolk.
Potts, Allen, ... Richmond.
Powell, J. J. A., ... Wytheville.
Prentis, Robert R., ... Suffolk.
Preston, Wm. C., ... Richmond.
Prince, J. B., ... Courtland.
Quarles, J. M., ... Staunton.
Randolph, Thomas J., ... Norfolk.
Ranson, Thomas D., ... Staunton.
Redd, S. C., ... Beaver Dam.
Richardson, D. C., ... Richmond.
Riely, John W., ... Houston.
Rixey, John F., ... Culpeper.
Robertson, Alex. F., ... Staunton.
Robertson, Edward W., ... Roanoke.
Robertson, William Gordon, ... Roanoke.
Robertson, Wm. J., ... Charlottesville.
Routh, H. A., ... Lebanon.
Rutherfoord, John, ... Richmond.
Sams, Conway Whittle, ... Norfolk.
Sands, Conway R., ... Richmond.
Sands, Wm. H., ... Richmond.
Saunders, P. L., ... Bedford City.
Scott, R. Taylor, ... Warrenton.

Segar, Arthur S., ... Hampton.
Seldner, A. B., ... Norfolk.
Sharp, Charles . . . . Norfolk.
Sheffey, J. P., ... Marion.
Sheild, Philip B., ... Richmond.
Shepherd, Jas. O., ... Buena Vista.
Shields, W. T., ... Lexington.
Simmons, Wm. B., ... Fincastle.
Sims, F. W., ... Louisa.
Sipe, George E., ... Harrisonburg.
Skeen, H. A. W., ... Big Stone Gap.
Smith, H. M., Jr., ... Richmond.
Smith, Lloyd T., ... Heathsville.
Smith, Roy B., ... Roanoke.
Smith, Willis B., ... Richmond.
Southall, R. G., ... Amelia C. H.
Southall, S. V., ... Charlottesville.
Staples, Waller R., ... Richmond.
Starke, L. D., ... Norfolk.
Steger, Robert H., ... Richmond.
Stephenson, John W., ... Warm Springs.
Stephenson, W. Roy, ... Winchester.
Stern, Jo. Lane, ... Richmond.
Stickley, E. E., ... Woodstock.
Stuart, J. J., ... Abingdon.
Sublett, E. S., ... Staunton.
Swanson, Claude A., ... Chatham.
Sydnor, Walter, ... Hanover C. H.
Tabb, Thomas, ... Hampton.
Taliaferro, William B., ... Gloucester C. H.
Taylor, John E., ... Manchester.
Tennant, W. Brydon, ... Richmond.
Thom, Alfred P., ... Norfolk.
Thomas, R. S., ... Smithfield.
Thomason, E. B., ... Richmond.
Throckmorton, C. W., ... Danville.
Tredway, John A., ... Chatham.
Tucker, H. St. George, ... Staunton.
Tucker, John Randolph, ... Lexington.
Tucker, John Randolph, Jr., ... Richmond.
Tunstall, Richard B., ... Norfolk.
Turnbull, N. S., ... Lawrenceville.
Turnbull, R., ... Lawrenceville.
[redacted] . . . . . Harrisonburg.
Turk, H. S., ... Front Royal.
y . . . . Staunton.

TYLER, D. GARDINER,	Sturgeon Point.
TYLER, H. M.,	Richmond.
VICARS, O. M.,	Wise C. H.
WADDILL, EDMUND, JR.,	Richmond.
WALKER, JAMES A.,	Wytheville.
WALLIS, WM.,	Big Stone Gap.
WALTON, M. L.,	Woodstock.
WASHINGTON, R. J.,	Oak Grove.
WATKINS, A. D.,	Farmville.
WATKINS, R. W.,	Houston.
WATTS, J. ALLEN,	Roanoke.
WATTS, LEGH R.,	Portsmouth.
WELLFORD, B. RANDOLPH,	Richmond.
WEST, J. F.,	Waverley.
WHITACRE, J. P.,	Winchester.
WHITE, HUGH A.,	Buena Vista.
WHITE, JAMES L.,	Abingdon.
WHITE, JOHN M.,	Charlottesville.
WHITE, MEADE F.,	Staunton.
WHITE, WM. H.,	Norfolk.
WHITEHURST, F. M.,	Norfolk.
WHITEHURST, WM. J.,	Prin. Anne C. H.
WICKHAM, WMS F.,	Richmond.
WILLARD, JOS. E.,	Fairfax C. H.
WILLCOX, THOMAS H.,	Norfolk.
WILLIAMS, JOHN G.,	Orange C. H.
WILLIAMS, JOHN J.,	Winchester.
WILLIAMS, MARTIN,	Bland C. H.
WILLIAMS, SAM'L G.,	Roanoke.
WILLIAMS, THOS. N.,	Clarksville.
WILSON, WM. V., JR.,	Lynchburg.
WINBORNE, R. W.,	Buena Vista.
WING, G. S.,	Blackstone.
WINSTON, FRANK V.,	Louisa.
WITHRS, E. B.,	Danville.
WOODS, MICAJAH,	Charlottesville.
WOODS, SAM'L B.,	Charlottesville.
WOODWARD, W. W.,	Saluda.
WOON, FRANK M.,	Richmond.
WUNDER, M. B.,	Woodstock.
YANCEY, ROBERT D.,	Lynchburg.
YARRELL, L. D.,	Emporia.
YONGE, JOHN E.,	Roanoke.
Total,	436 members.

ROLL OF MEMBERS.

1893.

HONORARY.

Lewis, L. L., ... Richmond.
(President Supreme Court of Appeals.)

Lacy, B. W., ... Tunstall.
(Judge Supreme Court of Appeals.)

Hinton, Drewry A., ... Petersburg.
(Judge Supreme Court of Appeals.)

Fauntleroy, T. T., ... Richmond.
(Judge Supreme Court of Appeals.)

Richardson, Ro. A., ... Marion.
(Judge Supreme Court of Appeals.)

Hughes, Ro. W., ... Norfolk.
(Judge United States District Court, Eastern District.)

Paul, John, ... Harrisonburg.
(Judge United States District Court, Western District.)

Hill, C. W., ... Norfolk.
(Judge First Circuit.)

Hancock, B. A., ... Manchester.
(Judge Second Circuit.)

Coleman, Samuel, F., ... Oak Forest.
(Judge Third Circuit.)

Whittle, S. G., ... Martinsville.
(Judge Fourth Circuit.)

Horseley, John D., ... Lovingston.
(Judge Fifth Circuit.)

Grimsley, D. A., ... Culpeper.
(Judge Sixth Circuit.)

Wellford, B. R., Jr., ... Richmond.
(Judge Seventh Circuit.)

Gunter, B. T., ... Accomack C. H.
(Judge Eighth Circuit.)

Wright, T. R. B., ... Tappahannock.
(Judge Ninth Circuit.)

Barton, W. S., ... Fredericksburg.
(Judge Tenth Circuit.)

Keith, James . . . . Warrenton.
(Judge Eleventh Circuit.)

TURNER, R. H., ... Front Royal.
(Judge Twelfth Circuit.)

McLAUGHLIN, WM., ... Lexington.
(Judge Thirteenth Circuit.)

BLAIR, H. E., ... Salem.
(Judge Fourteenth Circuit.)

WILLIAMS, SAMUEL W., ... Wytheville.
(Judge Fifteenth Circuit.)

KELLEY, J. A., ... Marion.
(Judge Sixteenth Circuit.)

MORRISON, H. S. K., ... Estillville.
(Judge Seventeenth Circuit.)

DUPUY, J. A., ... Roanoke.
(Judge Eighteenth Circuit.)

LAMB, JAMES C., ... Richmond.
(Judge Chancery Court.)

WITT, SAMUEL B., ... Richmond.
(Judge Hustings Court.)

DIGGS, J. SINGLETON, ... Lynchburg.
(Judge Hustings Court.)

BROOKE, D. TUCKER, ... Norfolk.
(Judge Corporation Court.)

CHARTER

OF THE

VIRGINIA STATE BAR ASSOCIATION.

Acts 1889–'90, page 634, chapter 376. An act to incorporate the Virginia State Bar Association.

Approved February 28, 1890.

1. Be it enacted by the General Assembly of Virginia, That William J. Robertson, R. G. H. Kean, Thomas Tabb, John W. Riely, James A. Walker, Holmes Conrad, Frank V. Winston, S. Ferguson Beach, John H. Fulton, Charles A. Graves, William R. McKenney, Richard B. Tunstall, James C. Lamb, Charles M. Blackford, William J. Leake, Thomas S. Martin, Alexander Hamilton, James E. Heath, Micajah Woods, George M. Harrison, F. H. McGuire, and such other persons as are now associated with them in the unincorporated society known as the Virginia State Bar Association, or as may be hereafter associated with them under this charter, be, and they are hereby, incorporated under the corporate name of "The Virginia State Bar Association," for the purpose of cultivating and advancing the science of jurisprudence, promoting reform in the law and in judicial procedure, facilitating the administration of justice in this State, and upholding and elevating the standard of honor, integrity, and courtesy in the legal profession.

2. The said corporation shall have power to adopt a seal and to change or break the same, to sue and be sued, and in its corporate name to take, institute, and prosecute any action, suit, or other proceeding in the courts of the land or elsewhere for the purpose of punishing or disbarring unworthy members of the profession or persons assuming its functions which may now be taken and prosecuted by any natural person: provided, that the party so proceeded against shall be a member of this corporation; to acquire by lease or purchase a suitable building or rooms, library, and furniture for the use of the corporation; to borrow money for such purpose and issue bonds therefor, and to secure the same by mortgage or deed of trust, and generally to acquire by purchase,

gift, devise, bequest, or otherwise, and to hold, transfer, and convey any and all such real or personal property as it may have and as may be necessary to carry out the purposes of this corporation: provided, it shall not hold real estate exceeding in value the sum of one hundred thousand dollars.

3. The said corporation shall have power to make and adopt a constitution and by-laws not inconsistent with the laws of this Commonwealth, rules and regulations for the admission, government, suspension and expulsion of its members, for the collection of fees and dues, the number and election of its officers, and to define their duties, and for the safe-keeping of its property and the management of its affairs, and to alter, modify and change such constitution, by-laws, rules and regulations from time to time.

4. All interest of any member of said corporation in its property shall terminate and vest in the corporation upon his ceasing to be a member thereof by death, resignation, expulsion, or otherwise.

5. The several officers of the said association at the time of the passage of this act shall continue to hold their respective offices, with powers, duties and emoluments provided by the constitution and by-laws of said association until their suceessors shall be elected and installed, and in case of any vacancy in any of said offices such vacancies shall be filled in the manner prescribed by the constitution and by-laws already adopted by said association, or as the same may, in conformity therewith, be altered and amended by this corporation, and the present constitution and by-laws of said association shall be the constitution and by-laws of said corporation until the same shall be altered or amended by said corporation. All property, rights and interests of said association now held by any or either of the officers thereof or any person or persons for its use and benefit, shall by virtue of this act vest in and become the property of the corporation hereby created, subject to the payment of the debts of the said association.

6. This act shall be in force from its passage.

CONSTITUTION AND BY-LAWS.

PREAMBLE.

The undersigned, members of the bar of the State of Virginia, in convention assembled at Virginia Beach, in the said State, on the 6th day of July, 1888, do hereby constitute and declare ourselves an association under the name and for the purposes hereinafter set forth, and do make and adopt the following constitution and by-laws for the organization and government of the said association.

CONSTITUTION.

ARTICLE I.

NAME.

This association shall be called "THE VIRGINIA STATE BAR ASSOCIATION."

ARTICLE II.

OBJECTS.

This association is formed to cultivate and advance the science of jurisprudence; to promote reform in the law and in judicial procedure; to facilitate the administration of justice in this State; and to uphold and elevate the standard of honor, integrity, and courtesy in the legal profession.

ARTICLE III.

MEMBERS.

1. *Active Members.*—Those members of the bar who attend the convention at which this association is formed, and who shall then and there subscribe to this constitution and pay the admission fee are hereby declared to be members of this association.

Any member of the bar in good standing, residing and practicing in the State of Virginia, who shall have been at the bar of this State at least one year, and any teacher in a regularly organized law school, may become a member by vote of the Committee

on Admissions, as may be provided in the by-laws, and upon subscribing to this constitution, or otherwise signifying in writing his acceptance of membership and paying the admission fee.

2. *Honorary Members.*—All judges of the courts of this State who are not eligible to membership under the preceding clause of this article, and the judges of the Federal courts who are citizens of Virginia, are hereby declared to be honorary members of the association, and shall continue such during their terms of office and no longer.

Honorary members shall not be eligible to any office in this association, but shall be entitled, without the payment of fees, to all of its privileges and to participate in its proceedings, except such as may be had in connection with complaints against individuals which may be made in matters affecting the interest of the legal profession, the practice of the law, and the administration of justice.

ARTICLE IV.

OFFICERS.

The officers of this association shall be a president, five vice-presidents—one to be selected from each of the following five grand divisions of the State, viz.: The Southwest, the Southside, Tidewater, Piedmont and the Valley—and a secretary and treasurer, whose duties shall be such as may be prescribed in the by-laws. They shall be elected at the annual meetings hereinafter provided for, except those first elected under this constitution.

They shall hold office from the adjournment of the meeting at which they are elected until the adjournment of the next succeeding annual meeting, except those first elected under this constitution, whose terms shall commence upon their election and expire at the adjournment of the first annual meeting. The president and the vice-presidents shall be ineligible for re-election until one year after the expiration of their terms of office.

The offices of secretary and treasurer shall be filled by one person, who shall receive as compensation for his services the sum of three hundred dollars per annum, payable quarterly.

All elections shall be by ballot.

ARTICLE V.

STANDING COMMITTEES.

There shall be the following standing committees of this association, to be chosen as hereinafter provided, whose duties shall be such as may be prescribed in the by-laws:

1. *Executive Committee*, to consist of six members.

2. *Committee on Admissions*, to consist of eighteen members, one to be selected from each of the judicial circuits of the State.

3. *Committee on Legislation and Law Reform*, to consist of eighteen members, one to be selected from each of the judicial circuits of the State.

4. *Judiciary Committee*, to consist of eighteen members, one to be selected from each of the judicial circuits of the State.

5. *Committee on Legal Education and Admission to the Bar*, to consist of five members.

6. *Committee on Library and Legal Literature*, to consist of five members.

7. *Committee on Grievances*, to consist of eighteen members, one to be selected from each of the judicial circuits of the State.

The members of the Executive Committee shall hold office as may be prescribed in the by-laws, and no member thereof shall be eligible for re-election until one year after the expiration of his term of office.

The members of all other standing committees shall hold office from the time of their appointment until the adjournment of the next succeeding annual meeting and until their successors are appointed.

Such other standing committees as shall be deemed necessary may be provided for in the by-laws.

ARTICLE VI.

ELECTION AND APPOINTMENT OF STANDING COMMITTEES.

The members of the Executive Committee, except those first elected under this constitution, shall be elected at the annual meetings in the manner provided in the by-laws.

The president shall appoint all other standing committees as soon as possible after the adjournment of each annual meeting, and shall announce them to the secretary, who shall immediately notify the persons so appointed.

ARTICLE VII.

MEETINGS.

This association shall meet annually in the month of July or August, at such time and place as the Executive Committee may select, and those present at such meetings shall constitute a quorum. Such notice of the meeting shall be given as may be prescribed in the by-laws.

Special meetings may be called at any time by the Executive Committee upon such notice as may be prescribed in the by-laws; and shall be called by said committee at any time upon the written request of twenty-five members, upon like notice. At a special meeting no business shall be transacted except such as is spe-

cified in the call therefor without the concurrence of at least four-fifths of those present; and at such a meeting forty members shall constitute a quorum.

ARTICLE VIII.

FEES AND DUES.

The admission fee shall be five dollars, and the annual dues shall be five dollars, to be paid as may be prescribed in the by-laws: *provided*, that the admission fee shall be in lieu of the annual dues for the current year in which it is paid. No member shall be qualified to exercise any privilege of membership while his fees or dues remain unpaid.

ARTICLE IX.

SUSPENSIONS AND EXPULSIONS.

Any member may be suspended or expelled for misconduct in his relations to this association, or in his profession, upon conviction thereof, in such manner as may be prescribed in the by-laws; and all interest in the property of the association of persons in any way ceasing to be members shall *ipso facto* vest in the association.

ARTICLE X.

VACANCIES.

In case of a vacancy in any office it shall be filled by appointment of the Executive Committee until the next annual or special meeting: *provided*, that a vacancy in the office of president shall be filled by the appointment of one of the vice-presidents. In case of a vacancy in any committee it shall be filled by appointment of the president until the next annual or special meeting. A person appointed to fill a vacancy shall hold the office until his successor is elected or appointed.

ARTICLE XI.

ANNUAL ADDRESSES AND PAPERS.

At each annual meeting the president shall deliver an address upon some subject to be selected by himself, in which he shall make such suggestions as to the work of the association as he may deem proper. An address shall also be made by some lawyer of prominence, not a resident of the State, to be invited by the Executive Committee. And papers shall be read by not more than five members of the association, to be selected by the Executive Committee as prescribed in the by-laws.

ARTICLE XII.

AMENDMENTS.

This constitution may be amended by a two-thirds vote of the members present at any meeting: *provided*, that if it be an annual meeting, notice of the proposed amendment, subscribed by at least five members, shall be given on the first day of such meeting; and if it be a special meeting a similar notice, similarly subscribed, shall be given in the call therefor.

ARTICLE XIII.

INCORPORATION.

This association shall be incorporated under the laws of the State of Virginia.

BY-LAWS.

I.

PRESIDENT AND VICE-PRESIDENT.

The president shall preside at all meetings of the association; he shall deliver the annual address and perform all other duties required of him by the constitution or by-laws. In his absence one of the vice-presidents shall preside, and, in the absence of all such officers, such person as may be called to the chair by the meeting.

II.

SECRETARY AND TREASURER.

The person holding the office of secretary and treasurer shall be charged with the following duties:

1. He shall keep full and accurate minutes of the proceedings of all meetings of the association, and of all other matters of which a record shall be ordered by the association; and he shall carefully preserve its archives and transmit them to his successor in office.

2. He shall, with the aid and concurrence of the president, when by the latter deemed expedient, conduct the correspondence of the association.

3. He shall keep at all times a complete and accurate roll of the members, officers and committees of the association, with their addresses; he shall notify new members of their election, and officers and members of committees of their election or appointment.

4. He shall, under the direction of the Executive Committee, issue notices of all meetings of the association, and in case of a special meeting shall add a brief note of the object thereof.

5. He shall, as secretary, report to the association at each annual meeting, giving a summary of his transactions during the preceding year and an outline of the business which is to come before the association at such annual meeting, so far as it relates to propositions or resolutions referred to any special or standing committee at the previous meeting. And he shall be the keeper of the seal of the association.

6. He shall collect, and, under the direction of the Executive Committee, disburse, deposit or invest the funds of the association.

7. He shall keep regular and accurate accounts in books belonging to the association, which shall be open at all times to the inspection of any member of the Executive Committee.

8. He shall report to the Executive Committee, whenever so required, the amount of money on hand or under his control, and any appropriations or charges affecting the same.

9. He shall, as treasurer, make a full and detailed report at each annual meeting, showing: (*a*) The receipts and disbursements of the preceding year, suitably classified; (*b*) all outstanding obligations of the association, and (*c*) an estimate of the resources and probable expenses for the coming year; and any suggestions he may think proper to make.

10. He shall submit his said report and all his books, vouchers, and papers relating thereto, to a committee to be appointed by the Executive Committee at its annual meeting, who shall audit and certify said report before its presentation to the association.

III.

EXECUTIVE COMMITTTEE.

1. The members of the Executive Committee first elected under this constitution shall forthwith divide themselves into three classes of two members each; the first class shall hold office for two years after the adjournment of the first annual meeting, the second class for one year after the adjournment of said meeting, and the third class until the adjournment of said meeting; at the said meeting, and thereafter at each annual meeting, there shall be elected, by ballot, two members of said committee, to hold office for three years, and such additional member as may be necessary to fill vacancies, if any, to hold office for the unexpired terms of their predecessors.

2. They shall have the general management of the affairs of the association, and shall make such regulations and take such action, not inconsistent with the constitution and by-laws, as may be necessary for the protection of its property.

3. They shall audit all accounts against the association, and no money shall be paid out of the treasury except upon a warrant signed by their secretary and countersigned by their chairman.

4. They shall, as soon as conveniently may be after their first election under this constitution, and thereafter as soon as conveniently may be after each annual meeting, invite some lawyer of prominence, not a resident of this State, to make an address before the association at its next annual meeting, upon some subject to be selected by the person so invited. And they shall at the same time select not more than five members of the association to prepare and read papers at the next annual meeting upon subjects to be chosen by the persons so selected, or such as may be suggested by the committee.

5. They shall, at least sixty days before each annual meeting of the association, select a place and a time within the months of July and August for holding such annual meeting, and prepare a printed programme of the proceedings to be held thereat. A copy of such programme and a notice of such meeting shall be mailed to each member of the association by its secretary.

6. They shall, at their annual meeting in each year, appoint a special committee of three members of the association to audit and certify the accounts of the treasurer before they are presented to the association.

7. They shall secure the services of a stenographer to report the proceedings of each annual meeting.

IV.

COMMITTEE ON ADMISSION.

1. All applications for membership in the association shall be in writing, signed by the applicant with his full name, and addressed to the Committee on Admissions. The application shall be endorsed by at least two members of the association not members of the committee, and by the member of the committee from the circuit in which the applicant resides: *provided,* that if the member of the said committee from any circuit have not registered at any annual meeting, or having registered shall have left the place where any annual meeting is held, it shall be the duty of the president of the association, on the request of the chairman of the Committee on Admissions, or in his absence of any member thereof, to designate a substitute for the said absentee, with power to act during his absence, naming one from the appropriate circuit, if convenient, or if not, any other member of the association.

2. If the application be presented at a meeting of the committee the vote thereon shall be by ballot, and every member present

shall be required to vote; one negative vote in every five votes cast shall be sufficient to reject the applicant.

3. If the application be presented during the vacation of the committee the method of proceeding shall be as follows: Upon its receipt by any member of the committee he shall forthwith refer it to the member of the committee from the judicial circuit in which the applicant resides, whose duty it shall be to diligently inquire as to the character and standing of the applicant and his eligibility to membership in the association. If, upon such inquiry, he finds the applicant free from objection, he shall endorse the application favorably; otherwise he shall withhold his endorsement and communicate his reasons therefor in writing to the chairman of the committee, and forward the application to him. If the application be favorably endorsed it shall be referred to the chairman of the committee, and if favorably endorsed by him and four other members of the committee, including the member from the circuit in which the applicant resides, the applicant shall be declared elected, and the secretary of the committee shall notify the secretary of the association of his election. If the application be returned unendorsed by the member of the committee from the judicial circuit in which the applicant resides, or if any member of the committee to whom it is referred refuse to endorse it, it shall be filed by the secretary of the committee until the next meeting of the committee. At such meeting such application shall be disposed of as provided by section 2 of this article. No candidate rejected shall be again proposed within a year.

4. No member of the committee shall disclose to any person the discussions, statements or votes of any member thereof upon any application for membership; nor shall the committee's decision upon any such application be made known to any person other than the applicant.

5. It shall be the duty of any member of the committee who has knowledge of any fact which, in his opinion, disqualifies the applicant for membership in the association, if it be in a meeting of the committee, to state such fact to the committee, and if it be in the vacation of the committee to withhold his endorsement of the application and communicate such fact to the chairman of the committee in writing.

6. The secretary of the committee shall keep, in a book provided for that purpose, a record of all applications for membership in the association, and shall preserve the originals of all applications among the archives of the committee.

V.

COMMITTEE ON LEGISLATION AND LAW REFORM.

1. It shall be the duty of the Committee on Legislation and Law Reform to scrutinize carefully all proposed changes in the law; to encourage and promote such as appear to be beneficial, and to check, as far as possible, all such as appear to be hasty or ill-advised; and to consider and recommend to the association such amendments of the law and of judicial procedure as will facilitate the administration of justice.

2. It shall be their duty, if at any time they deem it advisable, to cause a special meeting of the association to be called for the purpose of considering pending or proposed legislation.

VI.

JUDICIARY COMMITTEE.

It shall be the duty of the Judiciary Committee to carefully observe the practical working of our judicial system, to suggest, invite, entertain and examine projects and suggestions for changes or reforms in the system, and to consider and recommend to the association such action as they may deem expedient.

VII.

COMMITTEE ON LEGAL EDUCATION AND ADMISSION TO THE BAR.

It shall be the duty of the Committee on Legal Education and Admission to the Bar to take into consideration the subject of legal education and other requisites for admission to the bar, and to recommend to the association, from time to time, such action as they may deem necessary to guard the approaches to the profession from persons unfit for membership therein by reason of character or preparation.

VIII.

COMMITTEE ON LIBRARY AND LEGAL LITERATURE..

It shall be the duty of the Committee on Library and Legal Literature to influence, and if possible to secure, liberal appropriations for the different libraries of the Supreme Court of Appeals, and wise disbursements thereof; to facilitate the convenient use of said libraries by providing convenient catalogues of the same and seeing that proper rules as to the use of the same be adopted and enforced. They shall also have charge of the library of the association whenever one shall be established. And they shall recommend to the association from time to time such action as they may deem expedient.

IX.

COMMITTEE ON GRIEVANCES.

1. It shall be the duty of the Committee on Grievances to hear all complaints against members of the association, and also all complaints which may be made in matters affecting the interests of the legal profession, the practice of the law, and the administration of justice, and to report thereon to the association, with such recommendations as they may deem advisable; and in behalf of the association institute and carry on such proceedings against offenders and to such extent as the association may order.

2. Whenever any complaint shall be preferred against a member of the association for misconduct in his relations to the association, or in his profession, the person or persons preferring such complaint shall present it in writing to the Committee on Grievances, subscribed by the complaining party, plainly stating the matter complained of. If the committee are of opinion that the matters therein alleged are of sufficient importance, they shall cause a copy of the complaint, together with a notice of not less than five days of the time and place when the committee will meet for the consideration thereof, to be served upon the member complained of, either personally or by leaving the same at his place of business during office hours, properly addressed to him; and they shall cause a similar notice to be served on the party presenting the complaint. At the time and place appointed, or at such other time as may be named by the committee, the member complained of may file a written answer or defence, and the committee shall proceed to the consideration of the case upon such complaint and answer, or upon the complaint alone if no answer is interposed.

The complainant and the member complained of shall each be allowed to appear personally and by counsel. The witnesses shall vouch for the truth of the statements on their word of honor. The committee may summon witnesses, and, if such witnesses are members of the association, a neglect or refusal to appear may be reported to the association for its action.

The committee, of whom at least ten must be present at the trial, except that a less number may adjourn from time to time, shall hear and decide the case thus submitted to them, and shall determine all questions of evidence.

If they find the complaint, or any material part of it, be true, they shall so report to the association, with their recommendation as to the action to be taken thereon, and, if requested by either party, may, in their discretion, also report the evidence taken or any designated part thereof.

The association shall thereupon proceed to take such action on said report as they may see fit, provided only that no member

shall be expelled unless by the vote of two-thirds of the members present and voting.

Before the trial shall commence the member complained of may object peremptorily to any one or more of the committee not exceeding five; and the places of those objected to shall be supplied by appointment from members of the association by a majority of the remaining members of the committee who are present.

3. Whenever specific charges of fraud or unprofessional conduct shall be made in writing to the association against a member of the bar not a member of the association, or against a person pretending to be an attorney or counselor-at-law practicing in this State, said charges shall be investigated by the Committee on Grievances; and if, in any such case, said committee shall report in writing to the Executive Committee that, in its opinion, the case is such as requires further investigation or prosecution in the courts, the Executive Committee may appoint one or more members of the association to act as prosecutor, whose duty it shall be to conduct the further investigation or the prosecution of such offender, under the instructions and control of the Committee on Grievances.

The reasonable disbursements of the Committee on Grievances for expenses incurred in any such investigation or prosecution may be paid out of the funds of the association under the direction of the Executive Committee.

All the foregoing proceedings shall be secret, except as their publication is hereinbefore provided for, unless otherwise ordered by the association by a two-thirds vote.

X.

COMMITTEE ON PUBLICATIONS.

It shall be the duty of the president, on the first day of each annual meeting, to appoint a special committee of three members, to be known as the Committee on Publications, whose duty it shall be to determine which of the papers read at such annual meeting should be published with the reports of the association, as hereinafter provided.

XI.

COMMITTEE TO RECOMMEND OFFICERS.

It shall be the duty of the president, on the first day of each annual meeting, to appoint a special committee of five members, whose duty it shall be to consider and recommend to the association suitable persons for officers and members of the Executive Committee to be elected at such meeting; but the association

shall not be confined to the election of the persons so recommended.

XII.

GENERAL POWERS AND DUTIES OF STANDING COMMITTEES.

Except as otherwise expressly provided, each standing committee shall have the following powers and be charged with the following duties:

1. *Organization.*—They shall organize immediately upon their appointment, or as soon thereafter as possible, by electing one of their members as chairman and another as secretary. They may adopt regulations for their own government and proceedings not inconsistent with the constitution and by-laws, and subject to revision by the association.

2. *Meetings.*—They shall meet annually on the day preceding the annual meeting of the association; special meetings may be called by the chairman of any committee whenever in his opinion it may be necessary or advisable, and shall be called by him upon the written request of a quorum of the committee. At any meeting of the Executive Committee, the Committee on Legal Education and Admission to the Bar, or the Committee on Library and Legal Literature, three members shall constitute a quorum; at any meeting of any other standing committee five members shall constitute a quorum.

3. *Records and Archives.*—It shall be the duty of the secretary of each committee to keep full and accurate minutes of each meeting of the committee, and, under direction of the chairman, conduct its correspondence, and to carefully preserve its archives and transmit them to his successor in office.

4. *Voting by Correspondence.*—They may, by correspondence, consider and vote upon any matter which might properly come before them in meeting; such correspondence shall be carefully preserved by their secretary and a minute thereof entered upon his records.

5. *Annual Reports.*—They shall report to the association at each annual meeting, giving a summary of their proceedings since the last annual meeting, except such as they are prohibited from making public, and making such suggestions relative to their several departments as they may deem proper.

6. *Printing Reports in Advance.*—When any such report contains any recommendation for action on the part of the association it may, in the discretion of the committee, be printed in the manner in which the annual reports are required to be printed, and a copy thereof mailed by the secretary of the association to each member thereof at least fifteen days before the annual meeting at which such report is proposed to be submitted.

XIII.

ADDRESSES AND PAPERS.

The annual address of the president shall be made on the first day of the annual meeting immediately after the Association is called to order by the chairman of the Executive Committee. The address of the person to be invited by the Executive Committee shall be made at the morning session of the second day, and the reading of papers or essays shall be on the same day, or at such other time as the Executive Committee may determine.

XIV.

PUBLICATION OF ANNUAL REPORTS, ADDRESSES AND PAPERS.

All papers read before the association shall be lodged with the secretary. The annual address of the president, the reports of committees, and all proceedings at the annual meetings shall be published in the annual reports of the association; but no other address made or paper read or presented shall be published except by order of the Committee on Publications or of the association.

Extra copies of reports, addresses and papers read before the association, not exceeding two hundred copies of each, may be printed by order of the Committee on Publications for the use of the authors thereof.

The annual reports shall be published by the secretary, under the direction of the Executive Committee, and a copy thereof delivered to each member of the association.

XV.

CURRENT YEAR.

The current year of this association shall commence with the 1st day of July of each year and end with the 30th day of the following June.

XVI.

COLLECTION AND NON-PAYMENT OF FEES AND DUES.

The admission fee (except from those persons declared to be members by article III. of the constitution) shall be payable to the treasurer within thirty days after notification of election; and any member who shall fail within that time to notify the treasurer of his acceptance of membership and pay the admission fee shall be deemed to have declined membership, and cannot thereafter become a member except by being again regularly elected.

The annual dues shall be payable to the treasurer on or before the 1st day of September of each year, beginning with the 1st of September, 1889. If any member fail to pay said dues when payable the treasurer shall immediately forward to him an extract from this by-law, with notice that if his default shall continue for thirty days his name wll be dropped from the roll of members; and if said dues be not paid on or before the 1st day of October following the treasurer shall report the fact to the chairman of the Executive Committee, who shall order the name of such member to be struck from the rolls, and he shall thereupon cease to be a member of the association. But upon his written application satisfactorily explaining such default, and the payment of all dues to the date thereof, the Executive Committee shall have power to remit the penalty of this by-law.

XVII.

RESIGNATIONS.

Any member may resign at any time upon the payment of all dues and charges to the association, including his annual dues for the current year in which resignation is tendered: *provided*, there be no charges for misconduct pending against such member.

From the date of the receipt by the secretary of a notice of resignation, with an endorsement thereon by the treasurer that all dues have been paid, as above provided, the person giving such notice shall cease to be a member of the association.

XVIII.

LIMITATION OF DEBATE.

No member shall be permitted to speak more than twice on any subject, and in debate no speech shall exceed five minutes in length.

XIX.

ORDER OF BUSINESS.

At each annual meeting the order of business shall be as follows:

1. Call to order by the chairman of the Executive Committee.
2. Opening address of the president.
3. Appointment of Committee on Publications.
4. Appointment of Committee to Recommend Officers.
5. Reports of the Secretary and Treasurer.

6. Reports of standing committees:
   (a.) Executive Committee.
   (b.) Committee on Admissions.
   (c.) Committee on Legislation and Law Reform.
   (d.) Judiciary Committee.
   (e.) Committee on Legal Education and Admission to the Bar.
   (f.) Committee on Library and Legal Literature.
   (g.) Committee on Grievances.
7. Miscellaneous business.
8. Report of Committee to Recommend Officers.
9. Election of Officers.
10. Election of Members of Executive Committee.

XX.

AMENDMENTS.

These by-laws may be amended at any annual meeting of the association by a vote of two-thirds of those present: *provided*, that written notice of the proposed amendment shall be given on the first day of such meeting.

APPENDIX.

1893.

CRIME," thus following the examples of my distinguished predecessors in pursuing a practical line of remark, and hoping, like them, to so treat my subject that it may be agreeable to listen to and possibly profitable to read.

It will be seen that I have only gleaned in the old fields, where in the nature of things there is but little room for originality. But since to me so much that is old constantly appears to be very new, I may hope to present to you matters not too familiar, and which, if carefully considered, are full of food for reflection and perhaps of lessons of very practical value.

I have it in mind to review to some extent the origin and history of the criminal law; to regard its growth and fluctuations through altering degrees of leniency and severity; to mark its progress and retrogradations, as it was one time moved by wisdom and experience, and again fell under the insane control of superstition and its companion force; to consider the gradual effect which the birth and growth of sentiments of humanity among men had upon its condition and history; and at last to inquire how far the ultimate and natural reaction against tyranny and extreme severity in the administration of the criminal law may not have led us away from the prime origin and necessity for such a system, which was that guilty men might be so certainly and speedily punished as that good government may be preserved in the land, and the innocent live in peace and free from fear.

The history of jurisprudence, a modern writer has declared, is in great measure the history of civilization. But the science of jurisprudence has ever lagged in its course somewhat behind progress and enlightenment in material, and even in other intellectual sciences; for laws usually do and ought generally to come only after the necessity for them has manifested itself long enough and its demands have heen loud enough to awake to action the law-making power. This was true to a much greater extent when laws were the mere decrees of monarchs, for Parliaments and Legislatures feel much sooner than kings the pressure of public opinion and respond far more promptly to its demands. But in all times, in the laws enacted, we may read the story of habits, customs and crimes which demanded their enactment, and thus

the recorded law paints the picture of the character of the people.

In the nature of man criminal law, to quote again a learned writer, while the earliest in manifestation was the latest in reduction to a rational basis. Among the primitive barbarians violence was the habit, and the necessity for protection from it by law the rudimentary manifestation of the rule of reason. The first laws, like most of those which have succeeded them, were the results of some pressing necessity. Experience and reflection (after men came to profit by experience and learned to reflect) moderated the severity which the impulse of first enactment created. But all this was of very slow growth, and humanity, the companion and result of civilization, only after many years compelled revisions of the laws upon a rational and philosophic basis.

We shall see, however, that undue severity started not with the birth of the criminal law. It came many years after, and retaining its vital force long enough to do countless cruelties and wrongs, sunk first into disuse before the rising impulse of human feeling, and at last was swept from the statute books long after much of it had ceased to be more than an archaic curiosity, and when law had at last become truly the expression of reason and the rule of fair government.

What may properly be regarded as *crime* is easier to understand than it is to define. "An act or omission in respect of which legal punishment may be inflicted"; "rules of conduct, obedience to which may be enforced by the collective strength of the society in which they exist"; "an act committed or omitted in violation of a public law, either forbidding or commanding it"; these are some of the definitions of the word *crime*. But they are quite unsatisfactory. To let a chimney become foul, or to fail to clean the snow from one's pavement, are acts of omission which are in violation of public law (for such the laws of great municipalities may be called), and these are punishable by the collective strength of society. To keep coal oil or gunpowder stored in a warehouse in dangerous quantities is to commit an offence for which legal punishment may be inflicted upon the person in default. And yet the term *crime* could not be applied to such offences.

Neither is vice *per se*, such as sensuality, hard-heartedness, avarice, etc., called crime. The overt act exposes the criminal nature of the offender, but it is the *act* and not the nature which is *crime*, and which in our day is punished as such. Sin, although once so considered, is not *per se* crime under any civilized system of law.

But, in truth, the word has no technical meaning, at least in England and America, and times, circumstances and conditions have altered, from period to period, the acts and offences which may properly be classed under such a head. A distinguished author, for lack of a proper definition, has thus classified crimes: "(1) Attacks upon public order, internal or external; or (2) abuses or obstructions of public authority; or (3) acts injurious to the public in general; or (4) attacks upon the persons of individuals or upon rights annexed to the person; or (5) attacks upon the property of individuals or rights connected with and similar to rights of property."

But even if all this does not suffice for a definition, as I incline to think it does not, yet we have the satisfaction of knowing that when we talk about crimes we mutually understand what we mean, even though we may not be quite able to define it.

In a primitive and uncivilized state of society there was no such thing as crime in the sense in which we understand it; whatever wrong was done was a private matter between the perpetrator and the sufferer, and the penalty was the vengeance inflicted by the victim or by his kin and friends.

The first appearance of courts among the barbarous tribes of Europe was a rude tribunal which undertook only to adjudicate a fair compensation for the injury done. If, however, the sufferer or his friends was not content with this, he or they were at full liberty to exact such vengeance as they could with sword or axe. Hence, the penal law of such ancient communities was not the law of crime; it was the law of tort or personal wrong, and compensation was the penalty.

But in saying that barbaric law, so-called, did not impose penalties for crime; did not at least exact the death penalty, it is not to be supposed that there was no other way open to men for the gratification of their natural human instinct of cruelty ex-

cept the institution of private war. They slew the captives taken in battle; many tribes put the aged and infirm to death; superfluous infants were brained; human sacrifices were made to the gods; and, at least in India, the widow had, on the funeral pyre, a sincere reason to lament the demise of her lord. These were all murders not against the law, while the law itself imposed no such penalty for crime.

An exception to this rule of no penalty for crime certainly existed, however, among the American Indians, for when first discovered they were found to have fixed laws and penalties for certain offences, as for murder, robbery, &c., and regular methods of execution, and malefactors were put to death by them with great cruelty. Among the Abysinians, too, there is certainly a code, attributed to Constantine while that portion of Africa was under Byzantine influence, in which punishment by mutilation and the death penalty are freely prescribed for crime.

But the exception of the cases of the American Indians and of the borrowed civilization of the Abysinians do not effect the general rule, and it was true of all the incipient communities out of which civilized nations subsequently grew, that what is now called crime was only wrong done to the individual sufferer, and wrong to the State or community is an idea evolved out of the progress of civilization well within the time of which established tradition, at least, treats.

When society at last undertook to punish or hurt a malefactor by its collective strength, that right and its exercise was not so much a new and original assertion of power by the community as it was a restraint of original brute force with which the injured had punished the injurer for the harm done to him. It was sheer weariness of living in war and strife which first led men to assert and submit to the dominion of a kind of law, and as a consequence led the body of the community to compel submission from those who were still inclined to resist and rebel and to violate the rudimentary law which had been established by the community as the new rule of life.

And yet all of this was so rude and elementary that it can hardly measure up to the comparison which may be instituted between the first domesticated wild beasts and those which still continued to range the plains.

In the primitive barbarian codes which succeeded the mere wild animal state of man, no distinction was made between criminal and civil law ; bodily punishment, except to a slave, was unknown, and a fine—that is, a compensation—was the penalty. The matter at stake and the result to the so-called litigants was money or money's worth, the injured party (criminally or civilly, as we would distinguish) getting the fine. The tribe or State had still no share in the matter, for that came as a much later development of the science of government. Where murder or maiming had been committed or inflicted the same rules were prescribed. If the injured party or his friends were satisfied to take blood money, the injurer had it to pay, and the community (when at last it had reached that stage), under the law, forbade to him the right of armed defence. But it was a long step and a slow one until the individuals of the community were, upon any consideration, led to forego the natural and instinctive gratification of putting their adversaries to death. Thus by degrees incipient society bought its peace with this kind of bribe to the offended. When it grew stronger it took a further step and sought to repress violence and to punish it by exacting from the offender, on its own account, a part of the compensation adjudged for the offence, while it also took the advanced step of punishing private war as an offence in itself.

Thus the community only arrogated to itself a part of the power which in a state of nature belonged wholly to the injured person, and the embryo communal punishment was actuated by a desire to prevent persons not concerned in a quarrel from being disturbed by its avengement. By this slow and gradual but logical process society came to comprehend and respect that "peace and dignity of the State" for the preservation of which all our criminal laws are enacted.

Strangely marking how far the world has drifted from its first moorings, and yet how strongly conservative is all that comes from English sources, the critical historian calls attention to the fact that in all countries except England and those to which she has given her laws, the discovery and punishment of crime is treated as pre-eminently the affair of, and is in all its stages under the management of the government, while in England and in the

countries she has settled the prosecution is generally actuated and carried on by the individuals who consider themselves wronged, the law officers acting rather upon the impulse of the aggrieved parties than upon their own, and the duty of the judge being to see fair play between the prisoner and the prosecution, and never to be the partisans of the prosecuting government. But there is still this difference between old England and her American child. In the latter country (as she got her lessons from England since that country reformed her ancient practices) it has always been the people in whose name and on whose behalf the prosecution is authorized and enforced by law, while there was a time in England when the government, as such, was the prosecutor, and when the judges appointed by the King, and holding office at the Crown's pleasure, were its willing instruments to inflict its vengeance on those offending it.

Out of the fact that under the name of the people the real prosecutor is after all the injured person, comes the conclusion of that philosophic writer Sir James Fitzjames Stephen, that resentment, even hatred of and a spirit of vengeance against the criminal, is not to be too much inveighed against in a healthy Commonwealth. With that writer I agree, that for the injured to pretend that he has reached the sublimated state that makes him love the criminal while he hates the crime, is to deceive himself or to try to deceive others. Upon a reasonably controlled hatred of the offender because of his offence can the community alone rely for the sure punishment of the guilty and the consequent protection of the innocent. The mawkish sympathy sometimes manifested for our criminals is the sign rather of a weak head than of a soft heart, and its indulgence is as injurious to the best interests of society as the hallelujahs of the scaffold are to the propagation of a sound and honest religion.

The genealogy of the criminal law, like that of some families, is easier to trace in the names of the people from which it has sprung than it can be in the specific qualities which the different races concerned in it have imparted to it. Of the impressions left upon it by the ancient Britons we have scarce a trace. There remains nothing in our unsentimental but just common law which reminds us of the Druid contrast, which, while ordaining that the

mistletoe should be gathered with reverence and cut with a golden bill, yet also upon extraordinary emergencies did not hesitate to decree that a man should be sacrificed and future events told by the flow of his blood or the shape of his wound.

This side of that prehistoric time we know, that for fifty years before and four hundred and fifty years after the Christian era Republican and Imperial Rome, with its laws and legions, planted in that fair land of England its own splendid material civilization. Then we know that the armies of Rome went and German and Danish barbarians invaded the country. And then some six hundred years after the Roman evacuation came the Norman conquest, mixing with but not wholly superseding then existing conditions. What of Roman jurisdiction was imposed on the land during its five hundred years of occupation and how much of that impression its departing legions left behind is strangely in doubt, and the subject of singularly contradictory opinions. Whether only military rule, or the civil system of Rome, or a mixture of both prevailed, we cannot with certainty say, nor if the civil system prevailed to what extent it was established. Indeed, the whole early history of jurisprudence is involved in similar doubt.

Remembering that the English criminal law, until late in its history, was unwritten, we can better appreciate the reasons for the uncertainty which Blackstone gives. This want of definite knowledge, says that writer, exists—"First, from the nature of traditional law in general, which, being accommodated to the exigencies of the times, suffered by degrees insensible variations in practice, so that upon a comparison we plainly discern the alterations of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which the alteration occurred any more than we can discern the changes in the bed of a river which varies its shores by continual decreases and alluvions; secondly, this becomes impracticable from the antiquity of the kingdom and its government, which alone, though it had been disturbed by no foreign invasions, would make it impossible to search out the original of its laws unless we had as authentic monuments thereof as the Jews had by the hand of Moses; thirdly, this uncertainty of the origin of particular customs must also, in part, have arisen from the means by which

Christianity was propagated among our Saxon ancestors in the island by learned foreigners brought from Rome and other countries, who undoubtedly carried with them many of their own native customs, and probably prevailed upon the State to abrogate such usages as were inconsistent with our holy religion and to introduce many others that were more conformable thereto, and this perhaps may have partly been the cause that we find not only some rules of the Mosaical but also of the Imperial and Pontifical laws adopted into our system."

But, however doubtful may be the extent of the Roman impression left upon the laws and customs of Great Britain after the evacuation, it is impossible to contemplate the magnificence of Roman civilization planted in that barbarous isle, the evidence of which exists to sight and touch even to the present day, without being assured that the impulse of mind must have borne a just proportion to that of matter. The Roman legions left in England the Christian religion, the most civilizing of all instrumentalities, and the teachers of which have never failed to carry with them the customs and ideas which have influenced them in other than religious respects. They left also walled towns, paved roads, splendid specimens of architecture, no mean examples of art, instances of engineering and the mechanical sciences well-comparable with the advances of the present day; coins, medals, weapons, etc., along with which it is impossible to believe that after five hundred years of occupation they did only so impress their laws as that, as some contend, the impression vanished with the last departing legion and left the island to its ancient customs and rites uninfluenced by the civil law which Rome had taught the world. Indeed, there are unmistakable traces of Roman influence which should put the discussion to rest. It is only in doubt whether these impressions remained after the evacuation or came in at a later date, and what effect the advent of the Germans and Danes had upon them; whether, as one writer puts it, the customs of these barbarians came upon the Roman laws established in Britain as a wave or as a flood, mingling by assimilation as the former would, or wholly washing them away, like the latter.

After Rome we have six hundred years of German, Dane, Jute, Angle and Pict. We have a thousand years, during no part of

which can it be fairly said that there was a fixed and stable government in England, and private war, brigandage and rapine were the rule; and when we remember that, with but few exceptions, the criminal laws of England remained unwritten and unfixed by statute until about six hundred years ago, we do not wonder at the confusion involved in its history and the variant statements of its historians. One thing, however, seems agreed on, that the main rules of the criminal law came to England with the Saxons after the Roman evacuation, and are therefore of Teutonic origin.

Out of all this fog of doubt come, however, at least two distinct facts: First, the institution of Alfred's written laws (about 795), almost exactly in the language of Exodus, with numerous adaptations from the Acts of the Apostles and the nearly literal adoption of the Ten Commandments. And this, coupled, it is true, upon somewhat doubtful authority, with the rather refreshing statement that Alfred hanged forty of his judges for failing to render just judgments under the laws he had ordained. The second fact is the advent of William of Normandy just after Edward the Confessor, with the natural changes made by him.

William made judges of his favorites, and set them to administer laws and customs of which they were totally ignorant, although it is clear that there were some among them who were men of learning for their day, and who were well versed in the civil law. At first William directed that the laws of Edward the Confessor, which were something of an embodiment of the Teutonic system modified by Danish customs and mixed traditions of England, and which William had caused to be compiled, should be administered by his judges; but later he changed this and substituted the customs of Normandy in their stead. For a hundred years the Norman judges and their successors of the same race administered this system, but the customs of England being allowed to govern special cases, became precedents in future trials, and little by little they assimilated the Norman rules, and thus the common law of England became itself a system, until at last it found its fullest and most permanent expression in the great charter.

This historical outline is essential in order to show us that we must look for the philosophy of our system to Rome as well as to

Northern Europe, but more than anywhere else to England itself, where the seed sown by so many different hands by process of natural selection grew at last a tree different from any of those from which the seed had been taken; where the varying shades of light and feature make of English law a composite picture, so to speak, only revealing by careful analysis (if, indeed, it is revealable at all), the features of the different faces of which it is made up.

Only a knowledge of the sources of the law, to the extent to which they are available; of the deeds regarded as crimes; of their punishment and of the tests of guilt, and the rules of evidence from the Roman day to this, can give an insight into the philosophy of our own criminal system and show the reasons which have fixed its governing rules—this is the work of the book-maker and the delight of the student. The merest outline of these is all that is permitted to the essayist.

The Roman law, exactly the reverse of the common law, was all statute, decrees or orders. It took nothing by intendment and recognized no innate, no inherent right and justice. If the affirmative or positive law did not meet the case then there was a failure of justice, but to meet such an emergency in criminal cases certain tribunals were created to measure punishment as the particular cases seemed to demand, and according to the conscience, which often meant the disposition, of the judge, but this, however, within well fixed limits. In ordering a law, moreover, to meet a given case, the Romans had no hesitation in making it *ex post facto*, for in the civil law there was no such element as that which is taught by the maxim "time whereof the memory of man runneth not to the contrary," and which has generally enabled the common law to provide for emergencies which the statute did not meet.

The eighth of its twelve tables of the Roman law was that *de delicto*, and it includes crimes against the public as well as mere private wrongs, so imperfect still was the discrimination. This table, with subsequent enactments, declares what was crime under the Roman law, and it does not differ essentially from our modern list. But they enumerate the following among crimes termed extraordinary: corrupting the youth of both sexes; introducing new

religions, a law under which the Christians were prosecuted [Acts 21–20–21]; making what we call "a corner on corn"; vagabondage; burglary; violating tombs; defacing or removing landmarks, and unlawful assemblies.

Adultery was sharply punished, with a large liberty to the party wronged to be his own avenger; and that a man might keep his home free from the mere tread of unclean feet it was prescribed that after three warnings to an unwelcome visitor the master might slay the pernicious intruder as if he had been actually convicted of the guilty act.

Like the Roman law, the early English list included homicide, larceny, &c., in manner very similar to our own. We have observed that Alfred's laws embraced the Ten Commandments and many of the inhibitions of the Old and New Testaments. Treason, felony, and misdemeanor are the chief classifications, but while it is said by some that up to the time of Henry I. no distinction was made between the different degrees of homicide, yet the laws of Alfred, some two hundred years earlier, certainly define the crime of murder and divide it into degrees approximating the modern rule.

There was but little distinction between crimes against religion and those against the State. Heresy and sacrilege were conspicuous offences, it being declared that no one educated in or having confessed the Christian religion might deny any one of the three persons in the Holy Trinity to be God, and it is still the law of England that no one "may assert or maintain that there are more gods than one, or may deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority." Happily the enforcement of penalties for such offences has sunk into "innocuous desuetude."

It was in this same indiscriminating spirit that the Code of Connecticut of 1650 made them capital offences "to worship any other God but the Lord God" witchcraft, premeditated murder, Sodomy, adultery, rape, man-stealing, perjury against a man's life, insurrection or rebellion, for a child over sixteen years of age to curse or smite its parent, disobedience in children over sixteen years of age, each of which offences is supported by reference to verse and chapter of Exodus, Leviticus or Deuteronomy.

Acting on the stage, playing cards, cock-fighting, horse-racing, betting, failing to attend church, and walking on Sunday for pleasure were all crimes in England under the Commonwealth.

Of the spirit of the law in the New England colonies we have it from no less a friend of New England than Mr. Henry Cabot Lodge, that the early Puritans, believing themselves to be a chosen people, made religion a test of citizenship, and enforced to the last point the performance of religious duties, and legislated in the most parental and sumptuary fashion about everything, no matter how trifling, which they conceived could in any way affect morals. They dealt by law with what men and women thought, said or did in public or private affairs, and strove to regulate what they should eat or drink and wear, and how they should demean themselves under all circumstances.

Nor, indeed, were our Virginia ancestors as far from such narrow-minded influences as we are apt to boast that they were.

But the chief evidences and instances of fanaticism and superstition in the system of criminal law, and those most extensive as to the time and territory, were the laws against witchcraft and the Sunday laws.

Witchcraft was a crime under the Roman law. There was an English statute enacted against it in 1541 (Henry VIII.) which was repealed and re-enacted in 1562 under Elizabeth, making a second offence of witchcraft a felony without benefit of clergy, and sharply defining in what that crime consisted. This was a well known crime in Scotland, and witches were burned in numbers in 1572 and 1576. James VI. (James I. of England) believed in witchcraft and wrote a book on the subject. Fifty persons were executed for this crime in England in 1644–'45, and convictions were had as late as 1712. The English act was not repealed until 1736, in the reign of George II., but after its repeal, in 1751, a man and a woman were ducked in England for witchcraft, the woman dying from the effects of it. It is gratifying, however, to know that the leader of the ruffian gang which perpetrated the outrage was hanged.

In 1665 Sir Mathew Hale charged a jury that he "made no doubt at all there were such creatures as witches," and he sentenced two women to death for witchcraft upon proof that some

children had coughed up pins, and in this he was sustained by the great body of authority in England, both of law and theology. About a year ago I met at a railway station an elderly woman with a little child. Upon my remarking that the child looked badly the woman replied that it had a short time before swallowed a round river stone and a pistol cartridge, including the copper case, powder and ball, all of which the child had subsequently ejected from its stomach. I thought of Sir Mathew Hale, and wondered if he would not have regarded this as a clear case for the application of lynch law.

Because such opinions were so generally held and were supported by such high authority, we should wonder less that at Salem, in Massachusetts, in 1692, under the prosecution of Cotten Mather and Rev. Samuel Parris, with Sewell, Winthrop and Stoughton on the bench, nineteen persons were hanged and one pressed to death for witchcraft.

Percy Greg's is perhaps the most graphic and piquant of recent narratives of this event, but it is fairer to accept Mr. Henry Cabot Lodge's explanation when he says of this "violent case of mental disease at Salem," that the general causes were to be found "in the gloom of nature which beset the early settlers, in the hard toil in cultivating the sterile soil, the desolate and unending forest, the dread of Indian attacks and constant losses from them—all of which, combined with a severe and terrible religious faith, gave a dark tinge and brooding melancholy cast to the minds of the people." We cannot claim for the early Virginians exemption from fanaticism and superstition, but neither the nature of the soil, climate or character of the people ever led to such manifestations as we have spoken of in New and in Old England, for no man or woman was ever put to death for witchcraft in Virginia. We have, of course, the well-known case of Grace Sherwood, rather a common scold than a witch, in Princess Anne county in 1705. She was subjected to the water test, and swam, so she was guilty, and was confined in jail for a while, but she was not otherwise punished, and she lived until 1741.

We have also the account of two women ducked by military authority in 1755, and the archaic research of the editor of the William and Mary Quarterly has recently developed the case of

William Harding, of Northumberland county, who, in 1656, was convicted for witchcraft and received ten stripes on his bare back and was banished from the county; and also the case of Alice Cartwrite, of Lower Norfolk county, who, in 1678, was examined by a jury of women, who, finding "noe suspitious marks whereby we can judge her to be a witch," she was thereupon acquitted. Those versed in demonology will bear in mind that the "suspitious marks" were spots into which if a pin could be stuck without causing pain, the evidence of witchcraft was conclusive.

Washington's stoppage by a Connecticut tithing man in 1789, while traveling a short distance on Sunday to reach a point intended to have been reached on Saturday night, has given emphasis to the idea of the rigid nature of the Connecticut Sunday laws. But all through New England, as was also true at the time of Old England, both before and after our revolution, the Sunday laws were strictly enforced, and the inquisitorial character of those enactments is very marked. Under penalties church attendance and closing business on Saturday afternoon were compelled; traveling, walking for pleasure or exercise, and reading any but the dullest books was strictly forbidden, and the most minute details of domestic intercourse and duties were prescribed. At the end of a volume belonging to Jonathan Trumbull is a manuscript note of a trial by him as a justice of the peace. Among the notes is entered a complaint against Jona and Susan Smith for "a profanation of the Sabbath—namely, that on the —— day of ——, during divine service on the Lord's-day, they did smile"—and this by no means in a Pickwickian sense.

The Virginia laws against Sabbath breaking were hardly less puritanical. Work, sport and travel were prohibited and heavy penalties were imposed for failing to attend service. One man is said to have been excommunicated for wearing his hat in church. Swearing and drunkenness were punished by law, and for scandalous speeches against the authorities the pillory was appointed.

The recent wise provision of the Virginia Legislature for the preservation of the early records of our ancient counties has brought to light many valuable and interesting documents. Among them is a report to the grand jury of Henrico county in 1677-'78, which I cannot forbear reading to you:

"To the Rt Worll Court of Henrico county.

"John Worsham humbly showeth.

"That whereas yr Worships hath beene pleased to impose and appoint your petitionor one of the Grand Jury of this County of Henrico he doth for the discharge of his said place, and the oath by him taken, humbly present these persons whoos names are under written, and the offences or misdemeanors by them committed.

"The 3d day of February, it being the Sabbath, Joseph Royall was at cards, by his own confession.

"February ye 8th 1677, I see John Bowman drunke. Ditto Feb Mr Henry Lonne was drunke in my sight. February ye 10 1677 I see John Edwards & one of Mr Ishams servants at chequers on ye Sabbath day. Ffebruary ye 13 1677 Mr Martin Elam was by his owne confession drunke. March ye 20 My ffather Epes told me that John Milnor was drunke and alsoe Mr Thomas Chamberlaine and Mr Rullington was fighting which may appear at ye court by my father. Some tyme in March Jno Stuart by his owne confesseth was drunke 3 days together. April ye 9 1678—I see old Humphries drunke. Aprill ye 11 1678—My ffather and Mr Thos Chamberlaine were fighting & Mr Chamberlaine made a breach of the law, as it may appeare by evidence. Charles Featherstone by his owne confession has beene drunke since he has beene in ye Jury and at ye same tyme swore several Oathes in my hearing. Aprill ye 21st Henry Martin swore several oathes, it being on the Sabbath Day. Aprill ye 22d I see John Bowman drunke. Aprill ye 30th I see John Willson Sr drunke. May ye 5th 1678 I see Charles Featherstone and Edward Stratton Junior fighting and were much in drinke it being on the Sabbath daye at night. May ye 13 & 14 I see Edmund Belcher drunke. May ye 25th 78 I see Martin Elam and John Clyburn fighting. Mary Sparlowe by her own confession has not beene at church above three tymes within this twelve months. Some time since Christmas I see John Bowman drunke on the Sabbath daye and to the best of my knowledge Mr George Browning has not been at church 3 tymes since wee were in this place. And I think Mr. Pleasants and his wife comes not to church and likewise Mr William Hatcher.

"Recorded per Wm Randolph Clerk Court."

It will be seen that in these inquisitorial investigations our own forefathers did not differ much from the New Englanders, but nevertheless legislation against sin as such is not one of the follies which we have preserved by inheritance, and sumptuary laws of all sorts are sharply antagonistic to the genius and spirit of Virginia people.

The order of this investigation brings us now to a brief consideration of the penalties imposed by the criminal law for the offences which it condemns.

Rome had one set of penalties for the citizen and another for the slave and the stranger in her midst; for, whatever penalty was imposed, a Roman citizen could expiate it by a pecuniary compensation. For this England had its equivalent in the discriminating privilege of benefit of clergy.

Exile and the death penalty were imposed by the Roman law, and hanging, crucifixion, throwing from the Tarpeian rock, burning, throwing to wild beasts and drowning were among the modes by which capital punishment was inflicted. But in earlier times, and certainly for the greater number of offences, compensation was the penalty, and there was a specific rate of schedule at which all but the crimes called "extraordinary" were valued for punishment. It is related of Veratius, a Roman citizen, that he ran through the streets striking inoffensive passengers in the face, and his attendant purse-bearer immediately silenced their clamor by the legal tender of twenty-five pieces of copper, of about the value of a quarter of a dollar, this being the penalty which the law would have imposed if redress had been sought in that way.

There was a corresponding Saxon schedule which fixed six shillings as the compensation for mutilating a nose, four shillings for knocking out a tooth, and up as high as fifty shillings for a murder. For injuring a big toe the penalty was twenty shillings, or five shillings for a little toe.

Murder among the early English was only a wrong to be avenged by kindred; but from Exodus to Alfred it was deemed right to slay the slayer, and so by Alfred's institutions, as was true in the Roman law, the rule was "an eye for an eye and a tooth for a tooth," and it was written that the measure should be "tooth for tooth, hand for hand, foot for foot, burning for burning, wound

for wound, and stripe for stripe." So the mutilator was mutilated and the incendiary was burned, but since to the perjurer, the paracide and the practicer of witchcraft this rule could not be applied, the most ingenious devices of cruelty were resorted to.

In the eighteenth century it was still a capital offence in England to break the mound of a fish pond, to cut down a cherry tree in an orchard, or to be seen for one month among Gypseys, and even down to 1826 death was the penalty for all felonies except petit larceny and mayhem.

Blackstone fixed the number of capital offences at one hundred and sixty, and Sydney Smith declared that they were three hundred in number when he wrote. Both exaggerated the number, however, for each counted the things (as game, &c.) which it was a felony to kill.

In New York in 1761 men were whipped through the city at the cart's tail for petit larceny. In Boston in 1762 and 1769 the whipping-post and pillory were in full operation, and branding was applied for forgery. In New York in 1767 a negro man was hung for stealing, and at that time hanging was, for negroes, the fixed penalty for larceny, and for counterfeiting ears were cropped. In 1791 in New York death was still the penalty for forgery and in Massachusetts for robbery and burglary. In Massachusetts in 1687 binding to posts with chains, the stocks, and putting cleft sticks in the tongue were common punishments, and in 1631 a man had his ears cropped for making "hard speeches against Salem church." About that time, both in Massachusetts and in Virginia, ducking was the punishment for a common scold, and in this respect it is to be doubted if we have improved on our ancestors.

But this is detail enough and to spare. All this cruelty had its natural effect and the guilty very often wholly escaped punishment because their fellow-men were not inhuman enough to inflict the monstrous penalties which the laws imposed.

The lengthening pages of this already long paper forbid more than casual mention of those two extraordinary tests of guilt, the ordeals by fire and by water. These were superstition's blasphemous invitations to Deity to preside and give judgment in the tribunals of men. They found in the literal adaptations of the Holy Scriptures examples if not precept, in the cases of Shadrach,

Meshach and Abednego; in the casting of lot spoken of in the Old Testament; in the controversy of the prophet and the priests of Baal; in the baptism in the Jordan; and in the passage of the Red Sea. An incipient struggle between science and superstition sought explanation of the water test in cases of sorcery in the contention that those guilty of witchcraft lost their specific gravity, and therefore for natural reasons would inevitably float, and so the punishment by some other means of death must follow their escape from drowning.

The ancient Greeks and Romans had the counterpart of these ordeals in the much less harmful oracles and signs in the heavens and from sacrifices. The poet painter has perpetuated the story of this system of divine invocation in the legend and picture of the Vestal Tuccia, who with pure hands carried water to the temple in a sieve.

A like regard for brevity compels me also to put aside the kindred subject of the test by battle, and to forbear to tell of that romantic measure of guilt or innocence by which the accused must contend with his adversary for his fame or his life "until the stars came out"; so full, indeed, of interest to the student and the lawyer are those old fields whose exploration recent publications have made as easy as they are delightful.

But one test I must refer to—a test which marks the undying superstition of all ages; that is, touching the corpse, called the "bier test," when the slain body, it was believed, would bleed afresh at contact with the guilty.

> "O gentlemen, see, see dead Henry's wounds
> Open their congealed mouths and bleed afresh,"

was not written merely with the license of the poet.

This legal test was engrafted upon the codes of different European nations and was in force far up into the seventeenth century. The records of Accomac county, Va., show that the test was applied in the case of Paul Carter in 1680; so in Boyer county, New Jersey, in 1767, in the case of a slave suspected of murder, and evidence that such a test had been successfully applied was admitted, with other evidence, in the prosecution of a man named Gette in Pennsylvania as late as 1833. In the pre-

liminary proceedings, but not under judicial sanction, this test was applied in Pennsylvania in one case in 1860; at Verdiersville, in Virginia, in 1868, and at Lebanon, Illinois, in 1869.

We find the remnant of this practice, in a sort of rudimentary state but divested of all notion of the visible manifestation of God's judgment, in the custom, sometimes not without a useful purpose, of confronting the accused with the body of his slain victim, or of *a slain victim*, or of some supposed forcible reminder of the crime, such as taking him with the jury to the scene of the murder. Truth may sometimes come out of this, but I know no more dangerous test of it, for the imagination is naturally stimulated and excited, and it is not hard to mistake fancy for facts under such circumstances. The not unnatural agitation of an excitable defendant may offer proof of guilt to the jury strong as Holy Writ, while the accomplished actor of unmoved innocence may make a clear case for prompt acquittal.

But the church, which had created and fostered these visible judgments of God, itself at length abrogated them. A growing skepticism laughed them to scorn, and the influence of a revived and regenerated *Roman Jurisprudence* demonstrated their absurdity.

Little by little out of all this darkness there begins to shine the feeble light of a distant but coming civilization. The ordeals and bier tests give way to the trial by compurgators, under which the accused could be acquitted if a certain number of men would swear that they believed his oath of innocence, themselves knowing nothing of the facts and hearing no evidence. This was rather a conclusion based on the weight of character as opposed to suspicion of guilt—itself still an element of proof in the search for truth.

This compurgation proceeding was the embryo jury, then it became a jury in form, first being the witnesses themselves and then hearing evidence from others than those of their number in support of what they knew. Finally the jury reached the stage of knowing nothing personally of the accusation and relying solely upon the testimony of others. But this last stage was not reached in England until 1816.

Weary centuries were consumed in the progress of these gradations, and even now it cannot be said that we have reached the

very best system for the ascertainment of truth and the administration of justice, whatever that system yet to be discovered may be.

I have said nothing of the right of private war as distinguished from the trial by battle, nor of the refuge of sanctuary; nor has it been possible in reasonable space to even advert to the slow development of the organized tribunals which presided over these various tests of guilt or innocence, and which ultimately became themselves the reasonable triers of the accused. Nor can I more than name that comparatively modern monstrocity, the bill of attainder. Yet a knowledge of the details of all these is essential to a complete understanding of the history and philosophy of the criminal law.

How slow was the growth of modern rules, for the investigation of truth is shown by the fact that not until 1695 was it enacted that persons indicted for treason might have counsel or witnesses examined on oath, and not until 1702, in cases of treason and felony, could the witnesses be sworn at all. It was only a few years earlier than that time that counsel were allowed in any case, or that witnesses were ever examined in court—nor in England until 1837 was counsel allowed to address the jury in cases of treason and felony.

We have most reluctantly allowed the accused to be a witness in his own behalf, but in the early English prosecutions he was the chief witness, and, if the court could so manage it, the chief witness against himself.

Coke was the prosecutor of Sir Walter Raleigh, and the brief dialogue which I shall quote from that celebrated trial is an instance (fortunately an extreme and we hope a rare one) of the possibilities of trials conducted upon this principle:

Coke to the Prisoner: "Thou art the most vile and execrable traitor that ever lived."

Raleigh: "You speak indiscreetly, barbarously and uncivilly."

Coke: "I want words indeed to expose thy viperous treasons."

Raleigh: "I think you want words indeed, for you have spoken one thing half a dozen times."

Coke: "Thou art an odious fellow. Thy name is hateful to all the realm of England for thy pride."

Raleigh: "It will go hard to prove a measuring cast between you and me, Mr. Attorney."

Coke: "Well, I will now make it appear that there never lived a viler viper upon the face of the earth than thou."

At this day trials on the Continent of Europe, and especially in France, are conducted on this plan, but happily not in this coarse and cruel style. But lawyers trained in the present methods of England and America can scarcely read with composure the accounts of these trials as they appear in the daily papers.

Surely our system of jury trials in criminal cases is our best protection against such abuses and the constitutional provision, for it is our perpetual protest against and protection from the tyranny of judges and their subserviency to the prosecuting government. But do we not far pervert the true purposes of the system when we apply its cumbrous methods to small peccadillos, whether they were such at common law or since by statute? Is not such a remedy worse for the public than the possible wrong it may suffer?

Experience shows that this system is wholly ineffectual for the punishment of minor crimes, which should be left to the swift broom of the ordinary criminal scavenger. To vex the public with resorts to great constitutional bulwarks in behalf of the sneak thief and the pestilent disturber of the peace and propriety of society is as if one would brush a fly from his face with a sledge hammer.

As to rules of evidence at the time of which I am speaking, there were absolutely none. Rules on this subject were first established in the eighteenth century. The right of cross-examination does not even now exist on the Continent. It arose in England from the custom of allowing counsel to examine witnesses, but not to address the jury. The astute lawyer even now finds this often his best way of presenting his views to the jury.

Evidence of the character of the accused was in very early times an important element in every trial, and it was the very basis of the rules of compurgation. It was much perverted, however, as it sometimes is now, by confounding social or official position with character, as if that which ought to be really is.

The rule of admissibility of dying declarations is but one hundred years old. When this rule was sought to be introduced into India it was met with this naive objection by a learned native: "Such evidence," said he, "ought never to be admitted in any case. What motive for telling the truth can a man possibly have when he is at the point of death?" And a distinguished commentator observes that in India the occasion of death is regarded as the last opportunity the dying man can have for getting even with his enemies with impunity.

With no rules of evidence it is not to be wondered that men accused of crime were punished in proportion to the probabilities of guilt as shown by the testimony, and so the innocent would suffer penalties modified only by the weakness of the evidence against them.

Torture was the principal resource for procuring testimony. It seemed such a simple and easy mode. When the commission was appointed in 1872 to revise the Code for India, in the course of the testimony before it an officer of the civil service was asked why the native Indians preferred to retain the torture methods, and he gave this unique explanation: "Because," he said, "it is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the hot sun hunting up evidence."

It must be borne in mind, however, that tortures, as recognized by the law, was a very different thing from the torture of the inquisition, or from that used in so many stages of the world to persuade men to enjoy the peaceable fruits of righteousness. Guazzini, an early writer on the subject, defines torture to be "distress of body devised for extracting truth," but Baccaria says: "As if pain should be the test of truth, as if truth resided in the muscles and fibres of a creature in torture. By this method the robust will escape and the feeble be condemned."

Torture was never a part of the common law system, although it was sometimes wrongfully resorted to, and it was not unusual under warrant of the King in privy council in the reigns of Henry VIII. and Elizabeth. Coke, as Attorney General, and Bacon, as Lord Chancellor, put it in force and approved of it. In Scotland it was practiced with incredible cruelty and was legalized

from about the year 1400 up to the time of the union with England.

As a part of the legal procedure on the Continent it was not accompanied with great cruelty. The Romans recognized it and practiced it on slaves and strangers, but not on citizens. Among the barbarians who adopted codes framed after the civil law it was a part of their system, but it was guarded and limited with many restrictions. In Spain it was only employed when the proof of guilt was very strong but not quite strong enough for conviction. The reply of Johnson to the obsequious Hollander, which Boswell records, indicates how torture was regarded in that country a hundred years ago. "To torture in Holland," said the great Doctor, "is considered as a favor to an accused person, for no man is put to death there unless there is as much evidence against him as would amount to conviction in England." This was said in reference to the law of Holland, which provided that the criminal's confession was essential to capital punishment, no other evidence being sufficient, and if he insisted on his innocence he was tortured until he pronounced the words of confession. Comparatively harmless as torture was regarded under this system, yet one fails to discover the *favor* which it conferred upon the accused. It was not abolished in Holland until the year 1800.

In 1641 torture was legalized in Massachusetts in cases of capital punishment after conviction so as to procure proof against confederates. In large portions of Germany up to 1817, in Hanover up to 1819, and in Baden as late as 1831, the system prevailed. As late as 1879 the United States Government had to interfere on behalf of an American citizen subjected to torture in Venezuela, and in Russia it is in full force to-day.

Except the Massachusetts law of 1641 it has never been legalized in what is now the United States, and I know of but one instance of its application under the forms of law. Strange to say, that occurred in Texas in 1867, when two negroes suspected of stealing from a revenue collector were subjected to torture under the auspices of the Federal military authorities.

Under all systems where torture has been legalized the clergy seemed to have been exempted from its infliction, and it is pleasant to know that the legal profession, too, was in the same good

company. It was, perhaps, due to the fact that these two influential bodies did not themselves suffer its iniquities that the system was so long preserved.

It had ever been the rule of the Roman law that the accused could not be called on to prove the negative fact of his innocence, and in England under the common law each accused man had been held to be innocent until he was proved to be guilty, and a confession under both systems was deemed of no value unless it was voluntary. But the torture rule contradicted all this. With it came the secret inquest; the rule that the accused was to be regarded as guilty until his innocence was proved; trial was had without confronting the accused with either accuser or witnesses; the prisoner was sentenced in his absence; the rule prevailed that a forced confession was the truest and best evidence; that incrimination on the extorted confession of the accused was more certain and fairer than the testimony of any other witness; that counsel should never be allowed to a prisoner; that the penalty should be in proportion to the probability of guilt where the proof fell short of enough to convict; that the *corpus delicti* could properly be proved by a tortured confession; and, finally, that it was better that ninety-nine innocent men should be convicted and punished than that one guilty man should escape.

Humanity endured much and suffered long from these monstrous perversions before the reaction came. Is it to be wondered that when it came it was strong, lasting and progressive?

Speaking of the changes in criminal procedure about the time of William and Mary, Pike, the author of the History of Crime in England, says: "The old attempts to crush a prisoner by invectives from the bench, to interpret everything to his disadvantage and to deprive him as far as possible of a hearing are succeeded by a protection invariably accorded to him, by an anxiety to ascertain everything in his favor, and even by a wish to find a doubt of which he may have the benefit."

England has reacted sensibly from this reaction, but have not we in America carried the original reaction much too far? Does not our system suffer inordinate delays to occur and obstacles to trials to be interposed, so that, as we say, men's passions may cool, but really causing a just spirit of public indignation to be

worn out and to faint, and with the result in favor of crime and against the common weal?

In a charge to the United States grand jury by Judge Isaac C. Parker not long since at Fort Smith, Arkansas, he announced that the statistics show an increase in discovered murders of from 3,568 in 1889 to 6,791 in 1892, and that the whole number during those four years amounted to 20,557; that for the three years of 1890, 1891, and 1892 the number of murders discovered was 16,097. For this last number of murders 890 persons were executed and 15,207 escaped, but of the 890 executed only 332 were executed under process of law, while the remaining 558 were lynched.

The statistician of the Chicago *Tribune* states that in the ten years ending December 21, 1891, there were 518 legal executions and 426 lynchings in the Northern States, and 728 legal executions and 1,150 lynchings in the Southern States.

These statements can, at best, be but approximations, and they include none of the attempts at murder and none of those for which, from one reason and another, grand juries have found no indictments. In noting the number of murderers executed nothing is said of those who may have been punished by confinement in the penitentiary, and they are perhaps to be included in the large number who are declared to have escaped. If so this is misleading, for while they escaped capital punishment they cannot be said to have escaped punishment altogether, but it is a most startling fact that less than two per cent. of the murderers during three years were executed by process of law, while new crimes had to be committed in order to bring three per cent. of the murderers to the punishment they deserved. Equally startling is it that only about five per cent. of the discovered murderers are executed at all.

Another startling fact, which comes home most forcibly to us, is found in the large disproportion of lynchings attributed to the Southern States. There is in the forced co-dwelling of the two races in the South, and the strained relations which result therefrom; in the differences of temperament, the temptation and the horrible crime, the very conscious possibility of which puts reason to flight and scatters self-control to the winds, a just reason for this great difference, as the laws are and as they are administered.

To those who ignorantly rail against us all this is an unrealizable theory, while to us it is a horrible condition. But justify ourselves as we may, after all lynching is murder in some degree, and every tolerated instance of it in any community is a lapse to that extent into barbarism. It must be stopped at all hazards if we will preserve the reign of law in this country. I do not believe it can be stopped by "the strong arm," for the irresistible impulses which move men (often good men) to such a deed would break "the strong arm." He, however, who thinks that nothing can be done by the law has no confidence in the existence of an enlightened and undemagogued public opinion, and has lost faith in the power of the people to govern themselves. I have an abiding confidence in the ultimate conservatism and law-abiding spirit of the American people, and all that they need is guides to point and lead the way.

An able speaker and wise man, one year ago, in an address to this association, pointed out the reasons for these frequent failures of justice. He found them in inordinate delays not essential to justice; in continuances on insufficient excuses; frequently in dishonest jurors; in slight and insufficient verdicts, caused by personal influence or mawkish sentiment, and to these I add new trials too lightly granted; reversals on technical and strained grounds; and in the too often unrestrained demagogy of counsel. Now, let me add one more to this list, which I deem a most important addition. I mean the substantially free right of writ of error to the convicted and its absolute denial to the people. What often results? Our Constitution requires the concurrence of at least three members of our highest court to declare an act of the General Assembly unconstitutional, and yet in favor of the accused the best considered act of the people's representative may be wholly annulled by the fiat of one county or corporation judge and the people have absolutely no appeal. This is a travesty upon the caution of the Constitution and a favor to the criminal classes which is denied to the community, to the law-abiding and the innocent.

Instead of punishing our criminals we often pet and cajole them. If we hang them we make heroes of them and waft them to Heaven with the tear and the triumph of the martyr. We let

foolish women visit them in prison and weep over them and garland them with flowers, and sentimental men crowd the lobbies of the Governor to pray his pardon for the guilty if there be a shade less in his guilt than was true of some atrocious predecessor. Thus we turn the blade of the law even when it is drawn for punishment, and the salutary work of the prosecutor goes for nothing.

It is in our power to furnish a remedy for all of this. Punishment for crime should not be too severe, but it should be swift, certain, inexorable and unrelenting, and for certain offences the time which should elapse between the commission of the offence and its expiation on the scaffold should be so short that the lyncher will find his occupation gone, and all men will learn to look always to the law as the sure and just punisher of the guilty as they should ever find in it the certain protector of the innocent.

Impunity and mercy to the guilty is the falsest pity, for it is a pitiless unremembrance of the innocent. In every unguarded corner of our self-governing Republic there lurk a thousand foes. If we would perpetuate this great experiment we must see that it grows proportionately in all its parts. It is idle to talk of the unprecedented spread of wealth and luxury and material and intellectual development. These will be as evanescent as they are really evil if they are not accompanied by an equal growth in moral qualities and in respect and in obedience to the law. Peace and protection, people and property will always demand. Let it not be that it must be sought either in the violence of mob-lynch law, or in the tyranny of military rule, the ultimate destiny of every Republic which fails to govern.

I do not underrate the danger of rash and ill-considered legislation, but I do believe, too, that conservatism has its real perils. It tends to dwarf and shrink a part of the body politic while all the other parts are expanding and growing, and thus we loose symmetry and create deformity. Happily, the spirit of a wise, a careful and a painstaking reform is upon this association, which is the centre of thought in the science of the law in Virginia at least. Let us not turn deaf ears to changes proposed merely because they are novel or even startling. Many good things are so to us when we have not considered them. Let us not refuse to adopt them simply because we have never adopted them before.

And while we spend our time and thoughts devising schemes to better the manner of litigating the rights of property, let us not fail to inquire if equally as much consideration is not due from us to the rights of life and liberty. So that while this great country moves with giant strides in the increase of population and wealth, the intelligence, character and patriotism of its men may be found equal to the task of fostering in just proportions a greater and a better government for so great and free and prosperous a people.

NOTE.—Finding it extremely difficult and very inconvenient to cite in their appropriate places the different authors to the perusal of whose works I am indebted for most of the facts and many of the suggestions contained in this address, I concluded not to attempt to cite them at all, but merely to give a list of them, which I do as follows:

Stephen's History of the Crim. Law of England, 3 vols., 1883; Pike's History of Crime in England, 2 vols., 1873; The Genius and Development of the Laws of England, by John M. Stearn, 1889; Maine's Ancient Law; Gibbon's. Rome, Vol. IV.; Cooke's Virginia; Earth and Its Inhabitants (Africa), Vol. I.; Superstition and Force (Lea), 1892; Appleton's American Encyclopedia, art. entitled Criminal Law; Short History of the English Colonies of America (Henry Cabot Lodge); The Works of Captain John Smith; The Old-Time Series—Curious Punishments (Henry M. Brooks), 1886; The Green Bag Nos., September, 1892, and March, 1893; William and Mary Quarterly, January, 1893; Boswell's Johnson, Vol. I.; Greg's History of United States; Virginia Hist. Soc. Papers, Vol. XI.; Major John W. Riely's address before the Virginia State Bar Association, 1892; Code of Connecticut, 1650; State Trials; Baccaria on Crime; Virginia Carolorum; Blackstone's Commentaries; Hening's Statutes at Large.

PAPER

READ BY

CHARLES A. GRAVES.

EXTRINSIC EVIDENCE IN RESPECT TO WRITTEN INSTRUMENTS.[1]

The title of the paper which I have the honor to read this morning is in striking contrast with the topics which have been selected by the distinguished gentlemen who follow me on the programme. As befits one who comes from the quiet and seclusion of what may be termed the cloister of the law, I have chosen for my theme the consideration of results already reached; while they, fresh from the heat and dust of the arena, will speak to you of "Changes in Legislation" and "The Readjustment of the Law." And this is natural and right. In the language of Von Ihering in his brilliant essay, "The Struggle for Law," "All the law in the world has been obtained by strife. Every principle of law which exists had first to be wrung by force from those who denied it; and every legal right—the legal rights of nations as well as those of individuals—supposes a continual readiness to assert it and to defend it. The law is not mere theory, but living force." It might well be expected, therefore, that the "mighty men of valor," who have "gone down to the battle" in this ceaseless conflict for legal right, should report to their comrades what readjustment of the lines and what new weapons are needed; while to one whose humbler duty it has been to "tarry by the stuff," it may be permitted to furnish, as it were, an inventory of some of the weapons already in the legal armory, to show when they are available and when their use is forbidden by the rules of war, and thus

[1] At the request of members of the Bar Association, additional matter prepared for this paper, by way of explanation and corroboration, is printed in foot-notes.

perhaps to render some slight assistance to the fighting men when next they shall be called on to encounter the enemy.

It will not be supposed by an audience already familiar with the subject, that I propose, within the limits proper for this paper, to consider, in all its aspects, a branch of the law so extensive as that which is covered by the title "Extrinsic Evidence in respect to Written Instruments." My purpose is to confine the discussion to the use which may properly be made of extrinsic evidence in the interpretation of a valid written instrument, of a contractual or dispositive character, assuming such instrument to exist, and to be brought before the court for construction only. I shall thus avoid any inquiry as to the use of extrinsic evidence to show the invalidity of the instrument on the ground of want of delivery, the non-performance of a condition precedent, fraud, illegality, and the like.[1] Nor shall I stop to consider the rule of substantive law which forbids the use of parol evidence to "contradict or vary the terms of a valid written instrument." 1 Greenlf. Evid., § 275, *et seq.* On the contrary, I shall assume that the evidence is offered in aid of the construction of the instrument, and not avowedly to destroy it or to substitute a different instrument in its stead. And while the doctrines to be considered are equally applicable to all legal or solemn instruments,[2] it will conduce to brevity and clearness to take a will as the best type of such instruments, since it is upon wills that questions of interpretation most frequently arise, and the cases on wills furnish the best illustrations of the subject. Let us, then, in obedience to the injunction of old Bracton—"and it is commonly said that you must first catch your buck and afterwards skin him"[3]—

[1] For full discussion of these topics, see *Browne on Parol Evidence*—a valuable treatise recently published.

[2] Thus in Thayer's "Cases on Evidence," p. 928, note 1, it is said: "In considering Wigram's Propositions, it is not to be supposed that the rules relating to wills are essentially different from those concerning other solemn instruments." So in Stephen's "Digest of the Law of Evidence," the author considers in Art. 91, "What Evidence may be given for the Interpretation of Documents"; and in Note XXXIII. of the Appendix he says: "Article 91, indeed, will be found to differ from the six (seven?) propositions of Vice-Chancellor Wigram only in its arrangement and form of expression, and in the fact that it is not restricted to wills." See also Blackburn's "Contract of Sale," p. 50, note; *Grant* v. *Grant*, L. R. 5 C. P., pp. 728-9; 2 Taylor, Evidence, s. 1226.

[3] See Bracton's "Laws and Customs of England," Book 4, chapter 31, 191 b., where the Latin is, "*Et vulgariter dicitur, quod primo opportet cervum capere, et postea cum captus fuerit illum excoriare.*"

assume the existence of a valid written will, and proceed to inquire what use can properly be made of extrinsic evidence in aid of its interpretation.

In order to answer this question it becomes necessary to determine the true object of legal interpretation, for the means to be employed must be adapted to the end in view. What is it that the judicial expositor seeks to ascertain—is it the meaning of the words or the meaning of the writer? The question is frequently put in this way, as if the disjunction were complete, and the answer must be either the one or the other. We answer, neither. Not the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer. It is not the meaning of the words in the abstract, for the meaning of words varies with the circumstances under which they are used; and not the meaning of the writer apart from his words, for the question is one of interpretation, and what the writer meant to have said, but did not, is foreign to the inquiry; and *voluit sed non dixit* is the law's epitaph on a will which thus fails of its purpose. We must seek the meaning of the writer, but we must find it in his words; and we must seek the meaning of the words, but it must be the meaning of his words—of the words as he has used them—the meaning which they have "in the mouth of this party," to use the language of C. B. Eyre. *Gibson* v. *Minet*, 1 H. Bl., 615. For, as has been well said by Wigram (Ext. Evid., Pl. 105), "Courts of law recognize that natural dependence which exists between language and the circumstances with reference to which it is used, and which makes a knowledge of such circumstances necessary to a right interpretation of the language." And in another place (Pl. 59) he contrasts the evidence applicable to the purpose of determining the meaning of the words in the abstract with that resorted to in order to determine their meaning in the will.[1]

[1] In a valuable paper on "The Principles of Legal Interpretation," read before the Juridical Society of England, by F. Vaughan Hawkins, Esq., afterwards author of the well-known treatise on the construction of wills, it is contended (Jurid. Soc. Papers, Vol. II., p. 298, *et seq.*), that the office of the interpreter is to discover the intention of the writer—the meaning of the writer and not the meaning of the words. But as Mr. Hawkins is careful to state that by intention throughout his paper he means "not a mere inchoate act of the mind, not that which a person intended to do, but took no step towards doing, but something which as a mental act was complete, and which the writer

We have defined judicial interpretation as having for its ultimate object the meaning of the words as used by the writer—this being the equivalent of the legal intention, *i. e.*, the intention which the law recognizes as operative and dispositive. But it must not be supposed that the actual use of words by a testator can always be taken cognizance of by a court of construction, and given effect as determining his will. For there are rules of law, and legal rules of construction, which fix the use of certain words, or forms of expression; and the testator is held to have used them in the technical legal sense, though the judicial expositor may be persuaded to the contrary. I need not remind this audience of the rule in Shelley's case—now happily defunct in this Commonwealth—nor of the meaning formerly attached to the words, "if he die without issue." And a notable example was formerly found in a devise "to A," without words of limitation, which *per se* (*i. e.*, without aid from the context) conferred on A a life estate only, though judges have frequently confessed

endeavored to express by the words he made use of, although these words in fact express his meaning more or less imperfectly"; and as he further admits that the intention is unavailing unless sufficiently expressed in the writing, it would seem that this differs but little from ascertaining the meaning of the words as used by the writer. On the other hand, it is frequently said that in expounding a will the question is, not what was the intention of the testator, but what is the meaning of the words he has used. See *Rickman* v. *Carstairs*, 5 B. & Ad., 663; *Doe* v. *Gwillim*, 5 Id., 129; *Grey* v. *Pearson*, 6 H. L. C., 106. And in several Virginia cases it is said that "the inquiry is not what the testator meant to express, but what the words he has used do express." See *Wooton* v. *Redd's Ex'or*, 12 Gratt., 196, 207; *Burke* v. *Lee*, 76 Va., 386, 388; *Senger* v. *Senger*, 81 Va., 687, 696. But it is not believed that by the above expressions the learned judges meant to deny the proposition that the object of interpretation is to ascertain the meaning of the words as used by the writer. Thus in *Grey* v. *Pearson*, 6 H. L. C., 106, it is said by Lord Wensleydale, "The will must be in writing; and the only question is, what is the meaning of the words used in that writing"; but he immediately adds that in order to ascertain the meaning of the words, "every part of it (*i. e.*, the will) must be considered, with the help of those surrounding circumstances which are admissible in evidence to explain the words, and put the court as nearly as possible in the situation of the writer of the instrument"—which shows that by the expression "meaning of the words used in the writing" he intends not the meaning of the words in the abstract, but their meaning as used by the writer upon the particular occasion. And see article by Francis Morgan Nichols, Esq., on "The Rules which ought to govern the admission of Extrinsic Evidence in the interpretation of Wills" (2 Jurid. Soc. Papers, 351), where it is suggested that the opposing views as to the object of interpretation can be reconciled if the problem of interpretation be put in either of the two following forms: "What is the intended meaning of the words, or in what sense did the writer intend his words to be understood?" It will be seen that this is in effect the same thing as the meaning of the words as used by the writer. And see Hawkins on Wills, p. 1; Leake's Dig. Contracts, p. 217.

that nine times out of ten this was contrary to the testator's intention. *Kennon* v. *McRoberts*, 1 Wash. (Va.), 96.

And it should also be remarked that though the aim of interpretation is to discover the meaning of the words as used by the testator, it is not always possible to do so, either for want of evidence, or because the law excludes the evidence which is offered; and the will fails for uncertainty. Let us, then, expand our definition of the interpretation of a legal document, and say that it consists in ascertaining, by such evidence as the law permits, the meaning of the words as used by the writer, provided a different meaning be not required by rules of law or legal rules of construction.[1]

Having now ascertained the object of judicial interpretation, the next inquiry is, How is that object to be effected? How can we discover the meaning of the words as used by the writer? This is equivalent to the intended use of the words; and how is this intention to be manifested? At the outset, there is a presumption that a writer uses ordinary words in their ordinary meaning; and constructs his sentences according to the rules of grammar, of which the court takes judicial notice; and hence the lexicographical and grammatical sense of the words is also, *prima facie*, their meaning as used by the writer. And unless this presumption is rebutted by the context, or there is a difficulty in applying the words

[1] In connection with this definition of the object of interpretation it is proper, by way of caution, to recall the emphatic language of Eyre, C. B., in *Gibson* v. *Minet*, 1 H. Bl., 615: "All latitude of construction must submit to this restriction—namely, that the words may bear the sense which by construction is put upon them." And in the language of Sugden (*Attorney-General* v. *Drummond*, 1 D. & W., 367): "When the court has possession of all the facts which it is entitled to know, they will only enable the court to put a construction on the instrument consistent with the words; and the judge is not at liberty, because he has acquired a knowledge of those facts, to put a construction on the words which they do not properly bear." For cases in which this rule of construction was probably violated, reference is made to *Beaumont* v. *Fell*, 2 P. Wms., 140; and *Langston* v. *Langston*; 8 Bligh, 167; S. C., 2 Cl. & F., 194.

It should further be remembered that mistakes in wills cannot be corrected in order to change their construction. Not even a court of chancery has jurisdiction for that purpose. A mistake may be corrected by construction, if notwithstanding the mistake the context, properly expounded by the aid of the facts, shows clearly what is meant; but this is as far as the court can go. *Goode* v. *Goode*, 22 Mo., 518 (66 Am. Dec., 630, and note); *Sturgis* v. *Work*, 122 Ind., 134 (17 Am. St. Rep., 349.) And yet there are cases where the testator, under a mistake as to the state of his property, has made one bequest, and the court has taken the liberty to conjecture what he would have intended if he had known the true state of the facts, and has decreed accordingly. See for examples, the English cases of *Selwood* v. *Mildmay*, 3 Vesey, 306, and *Lindgren* v. *Lindgren*, 9 Beav., 358, and a case recently decided by the Supreme Court of Pennsylvania. Washington and Lee University's Appeal, 111 Pa. St. Rep., 572—all of which are believed to be wrong upon principle.

to the facts of the case, unless they are insensible when brought into contact with the facts, the maxim of Vattel applies: "It is not permitted to interpret what has no need of interpretation," and the writer is taken to mean what he says. And this presumption that words are used in their strict and primary sense will not be affected by the mere fact that when so interpreted the will may seem capricious and unreasonable, or even cruel and unjust. For the court must interpret the will of the testator, not make his will for him; and he may have had secret motives of which the court is ignorant. At all events, to the suggestion that his will is unreasonable, he has the legal right to reply, as does the Roman matron in the satire of Juvenal, "*Hoc volo, sic jubeo, sit pro ratione voluntas.*"[1]

It is also a principle of interpretation that a precisely named legatee must take, at least if the testator knew of his existence, through some other person, partially described by the words, may seem to be the one whom the testator ought to have intended. See *Am. Bible Society* v. *Pratt*, 9 Allen (Mass.), 109; *Tucker* v. *Seaman's Aid Society*, 7 Met., 188. Thus in *Mostyn* v. *Mostyn*, 5 H. of L. Cas., 155, it was suggested that the name "John" in the will was a mistake, and that the testatrix meant Thomas. But the Lord Chancellor said: "I think it impossible for a court of justice to act on that suggestion. We cannot ask the testatrix in her grave what she meant. If we could she might say, 'I said John, and I meant John.' There is nothing in the will inconsistent with that. And, therefore, what we are now asked to do might be in direct violation of the will of the testatrix."[2]

---

[1] "Testators have a right to be eccentric, capricious, arbitrary, and, so far as the term may be used, unjust; nor does it seldom, I believe, happen that they have reasons known to themselves, though not to those who expound their wills, for dispositions seemingly strange and unreasonable. Testators are not bound to have good or any reasons for what they do, or when they have reasons to state them." Per Knight Bruce, L. J., in *Hart* v. *Tulk*, 2 De. G., Mc. N. & G., 313. See, also, *Bird* v. *Luckie*, 8 Hare, 306.

[2] For an example under the rule that a precisely named legatee must take, however improbable it may be that he was really intended by the testator, unless such intent be irrational, see *In re* Peel, 2 L. R. P. & D. 46, of which case Mr. Taylor says (2 Taylor on Evidence, s. 1202, n. 6) that it "may be considered by some unprofessional men as a reduction of this rule to an absurdity." As indicating that the courts will evade the rule whenever it is possible to do so, see *in re* Wolverton Mortgaged Estates, 7 Ch, D., 197. And see also *Powell* v. *Biddle*, 2 Dallas, 70 (1 Am. Dec. 268), a case which seems to be correctly decided, notwithstanding the sharp criticism on it by Shaw, C. J., in *Tucker* v. *Seaman's Aid Society*, *supra*.

But a will may contain words not in ordinary use, and yet they may be familiarly employed in some locality, or in some trade or profession, or in a sense peculiar to a religious sect, or the like. In such cases the provincial or technical or sectarian meaning will be adopted by the interpreter as the meaning of the words as used by the writer. Indeed, a will may be written in whole or in part in cipher or in short-hand, and then the signs on the instrument, as used by the writer, must be translated into words, and the will interpreted accordingly. It is in order to include this case, no doubt, that Sir Fitzjames Stephen defines the construction of a document to be "ascertaining the meaning of the signs or words made upon it and their relation to facts." An example under this head is found in the case of *Kell* v. *Charmer*, 23 Beav., 195, where the will read, "I give and bequeath to my son William the sum of i. x. x. To my son Robert Charles the sum of o. x. x." And evidence was admitted to show that the testator was a jeweler, and in the course of his business used certain private marks or symbols to denote prices or sums of money, and that by such system the letters i. x. x. and o. x. x. denoted £100 and £200 respectively; and this meaning of the letters as used by the testator in his business was adopted as their meaning as used in his will, and the legacies were decreed accordingly.

But though the words are in ordinary use, and have a strict and primary meaning, it may nevertheless be manifest from the context of the will that, as used by the testator, their meaning is not their primary sense, but some less proper or secondary sense, and they will be so interpreted; and this, notwithstanding their primary sense may be fixed by a legal rule of construction, as distinguished from a rule of law. In this case the Court, in the language of Lord Cairns in *Hill* v. *Crook* (L. R. 6 H. of L. case, 265, 285), uses the context "as the dictionary from which to find the meaning of the terms he has used," and they are interpreted "according to that nomenclature, and not in their ordinary sense.[1]

[1] An example of this use of the context of a will is furnished by a very recent English case In Goods of Ashton, 1892, P. 83, where it is said by Jeune, J.: "In this will the testator, to use the language of Lord Cairns in *Hill* v. *Crook*, 'has made us a dictionary.' If he had done it in terms, there would have been nothing more to be said;

But apart from the context of the will there is another way in which the presumption that the words were used in their ordinary sense may be repelled. For, to use the language of the Supreme Court of Massachusetts (*Doherty* v. *Hill*, 144 Mass., 468), "in every case the words must be translated into things and facts by parol evidence"—that is to say, the court must inquire as to the application of the words to the facts to see if the words can be made operative. This process is thus described by Judge Moncure (*Roy* v. *Rowzie*, 25 Gratt., 599): "The court of construction, with the testator's will in hand, looks for the object of his bounty and the thing intended to be given, and expects them to answer precisely the terms of description given of them in the will. Generally they do, and there is no difficulty. Often they do not, and sometimes there are two or more objects or subjects which answer precisely, or equally, the description contained in the will."

Here, then, we find a predicament of facts which calls for the use of extrinsic evidence in aid of the interpretation of the writing. But extrinsic evidence of what? How shall the meaning of the words as used by the testator be discovered when dictionary and grammar fail us, and the context affords no assistance? There are but two possible sources of information—viz., the facts and circumstances of the case, and the intention of the testator as declared by him before, at, or after the making of his will. For though the difficulty was caused by the facts, yet it is possible that it will disappear on further inquiry into the facts; thus justifying the wisdom of the nursery paradox:

---

but he seems to me to have done it practically, because he has used the word 'nephew' where it clearly meant an illegitimate grand-nephew, and he has also described as his 'niece' a person who was his illegitimate niece. He has made his dictionary for us in an unambiguous way, and if we are entitled to use that dictionary it makes the case clear." And he decided that he was entitled to use it, and decreed accordingly. The meaning of the words as used by the testator, in a particular text of his will, can also be ascertained from the testator's testamentary plan and purpose as apparent on the face of the will. Thus in *Byng* v. *Byng*, 10 H. L. Cas., 170, it was held that the rule in Wild's Case (which is a rule of construction and not a rule of law, see *Clifford* v. *Koe*, 5 App. Cas., 447), would yield to an intent manifested by the whole context of the will, so that in a devise "to A and her children," though there were children of A living at the "time of the will," the word "children" was construed as a word of limitation, thereby creating an estate tail. For the peculiar doctrine in Virginia as to the effect of a gift "to A and her children," see *Mosby* v. *Paul's Adm'r*, 88 Va., 533, where the previous Virginia cases are cited.

"There was a man in our town,
And he was wondrous wise;

(This describes the judicial expositor, of course.)

"He jumped into a bramble bush,
And scratched out both his eyes.

(This is the unhappy situation of the aforesaid expositor after his first encounter with the facts; yet, mark you:)

"But when he found his eyes were out,
With all his might and main
He jumped into another bush,

(More facts, obviously.)

"And scratched them in again."

But this is not always the happy issue out of all his troubles of the judge who journeys, will in hand, among the facts surrounding the testator. It sometimes happens that from those facts there is "no light, but rather darkness visible," and the interpreter must turn elsewhere for help; or—that tragedy of judicial interpretation—the will must fail for uncertainty. But whither can he turn? The text, context and facts have been appealed to in vain. There is but one recourse; the testator must be allowed himself to declare his meaning; his extrinsic declarations of intention must be received in evidence, and actual intention, as thus manifested, must be invoked to throw light on the meaning of the words as used in the will.

We have now seen all the extrinsic evidence that can be offered in aid of the interpretation of a will, and we find that it is divisible into two great classes. Of these the first consists of material facts, and these may concern the testator, his property, his family, the claimant or claimants under the will, their relations to the testator, &c. The second class, on the other hand, is confined to direct evidence of the testator's actual intention, such as his declarations of intention, his informal memoranda for his will, his instructions for its preparation, and his statements to the scrivener or others as to the meaning of its language. And this division of extrinsic evidence not only exists in the nature of the case, but is of the utmost practical importance in the interpreta-

tion of wills, as the rules for the admissibility of the two kinds of evidence are not the same. Let us call the first kind ***the facts and circumstances***, and use the expression ***declarations of intention*** to describe all extrinsic statements by a testator as to his actual testamentary intentions—*i. e.*, as to what he has done, or designs to do, by his will, or as to the meaning of its words as used by him. And with this understanding of the terms, let us now inquire what use can be made, in the interpretation of a will, of the facts and circumstances, and what of the testator's declarations of intention.

As to the facts and circumstances, the law is that they are always admissible in evidence in a case of disputed interpretation; and this is clearly right.[1] For the object of interpretation is to ascertain the meaning of the words as used by the testator; what the words represented in his mind; what he understood to be signified by them: and for this purpose it is indispensable that the expositor should know the situation of the testator; the state of his family and property; his relations to persons and things; his opinions and beliefs; his hopes and fears; his habits of thought and of language; in a word, that the interpreter should identify himself with the testator as to knowledge, feeling, and speech, and thus, scanning the words of the will from the testator's point of view, decide as to their meaning as used by him. In the language of Chief Justice Marshall (*Smith* v. *Bell*, 6 Peters, 74): "In the construction of ambiguous expressions the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees; the affection subsisting between them; the motives which may reasonably be supposed to operate with him and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words, and in ascertaining the meaning in which the testator used them." And this language is quoted and approved in ***Colton*** v. ***Colton***, 127 U. S., 300. And in ***Hatcher*** v. ***Hatcher***, 80 Va., 169, it is said: "In order to better comprehend the scheme which the testator had in his mind for the disposition of his estate, the judicial expositor is permitted to place himself,

[1] See Wigram, Ext. Evid., Prop. V.; 2 Wharton Evid., § 998; 2 Taylor, Evid., § 1198; 1 Redfield, Wills, p. 621; 1 Jarman, Wills, p. 422; *Allgood* v. *Blake*, L. R. 8., Eq. 160.

figuratively speaking, in the very shoes of the person whose will he is called on to construe, and with the aid of such extrinsic evidence as is admissible for the purpose to possess himself of the condition of the testator and his family, and of such surrounding facts and circumstances as may be reasonably supposed to have influenced him in the disposition of his property." See, also, *Miller* v. *Potterfield*, 86 Va., 876.

It has been seen that evidence of the surrounding facts and circumstances is always admissible in aid of the interpretation of the will—*i. e.*, as explanatory of the meaning of the words as used by the testator. It may be of interest now to inquire how facts can explain words, and how interpretation can be influenced by the situation of the testator and the circumstances under which the will was written.

In the first place, it frequently happens that when the words are capable of two meanings, the facts negative the possibility of one meaning, and thus leave the other as necessarily the meaning of the words as used by the testator. Thus, to take a case put by Lord Coke (The Lord Cheyney's case, 5 Co., 68): If a man devise his land "to my son John," and it turns out that at the date of the will he had two sons named John, there arises a difficulty as to the son intended by the testator. If now it be shown that the elder son had been long absent and unheard of, and was believed by the testator to be dead, these facts negative the supposition that the word "John" meant for him his elder son, and so the name, as used by him, in the light of the facts, signifies the younger son, and thus the facts have become explanatory of the word.

Again, when the words describe equally two different things the situation of the property may show clearly what is meant. Thus, to take a case put by Wigram[1]: "Suppose a testator, resident in India, to bequeath to A B, who was also in India, some specific chattel—*e. g.*, a gold watch—and that the testator had with him a specific chattel of the kind described, and that he was also owner of another of the same description which he had left in England twenty years before." Any one would say that un-

[1] Extrinsic Evidence in Aid of the Interpretation of Wills, Pl. 73 and 77.

der these circumstances "my gold watch" meant to the testator the gold watch in India; that this was the meaning of the words as used by him. The reason given by Wigram is that no testator, if he had intended to bequeath the watch he had left in England, could possibly have thought the description he had used sufficient, whereas it would be otherwise with the watch in India. In other words, when we understand the facts in the case, and place ourselves in the situation of the testator, we see that what was in the abstract an insufficient description becomes sufficient from his point of view, and the interpreter is judicially persuaded of the meaning of the words as used by him. And while the effect is to construe "my gold watch" as equivalent to "my gold watch *in India*," the words "in India" are not added to the will *in order to* its interpretation, but *by* the interpretation of the will, in the light of the facts, it is found that the words "my gold watch," as used in the will, *mean* my gold watch in India, and they are therefore construed accordingly.

In the third place, facts may be directly explanatory of the meaning of the words as used by the testator when it is shown that he has been in the habit of calling certain persons by pet-names or nick-names, or of using any words with a meaning peculiar to himself. Thus in *Lee* v. *Pain*, 4 Hare, 251, the testatrix, who was an old lady, had been a great friend of Rev. Mr. Bowden, and of his daughter, Miss Bowden; and on the marriage of the latter to Rev. Mr. Washbourne she seems not to have taken kindly to the new name, but called her Mrs. Bowden, instead of Mrs. Washbourne; and when there was a daughter born to Mrs. Washbourne, she called the daughter, with a perverse consistency, Miss Bowden. And when her will was read—to show how completely she had been living in a past generation of names—it was found to contain legacies "to Mrs. and Miss Bowden, of Hammersmith, widow and daughter of the late Rev. Mr. Bowden." And yet in the light of the facts, there being no persons to answer either the names or the description in the will taken literally, there could be do doubt that, in spite of the curious misuse of words, the words as used meant for the testatrix, "Mrs. and Miss Washbourne," and it was held that they were entitled to the legacies.

There is still another way in which facts may be explanatory of words in a case of disputed interpretation. In the three cases already considered there was no question as to the testator's motives. But suppose the facts offered in evidence show that the situation of the testator towards one of the two claimants was such that he was prompted by the strongest motives of affection, or gratitude, or natural duty (or, perhaps, all three combined) to make a provision by will for him; whereas none of these reasons existed in favor of the other, but the exact reverse. Now, if the words in the will should equally describe both claimants, or should be in part applicable to one and in part to the other, these facts showing motive, when brought into contact with the words in the will, tend, as the subjective antecedents of intention, to render it probable that, as used by the testator, the words describe one claimant rather than the other, and so become explanatory of the words. And thus probability becomes the guide of interpretation, as it has been said to be the guide of life. And if it be objected that we have here made use of actual intention in order to ascertain the meaning of the words, the answer is that actual intention, so far as it may be involved in the facts, and provided it is not made the subject of direct proof, as itself a substantive, independent fact, is always admissible in evidence, in connection with the words in the will, and becomes explanatory of the words, and of evidential value, because it is relevant to the real issue—the meaning of the words as used by the testator.

We are now ready to take up the second class of extrinsic evidence, viz.: The testator's declarations of intention as contrasted with the facts and circumstances of the case. And here, in the language of Lord Coke, we must "note a diversity" in this respect, that while the material facts are always admissible, there is but one situation in which the judicial expositor has the right to invoke the aid of declarations of intention, and that is where the words in the will describe well, but equally well, two or more persons, or two or more things, and such declarations are offered to show which person or which thing was meant by the testator—*i. e.*, by the words in the will as used by him. This is the case of "equivocation," as it is called by Lord Bacon, and it is exemplified by a devise "to John Cluer, of Calcot," when there are two

persons who answer that description; or a devise of "the close in Kirton, now in the occupation of John Watson," when the testator owns two closes in Kirton, both, at the date of the will, in the occupation of John Watson. *Jones* v. *Newman*, 1 W. Bl., 60; *Richardson* v. *Watson*, 4 B. & A., 799.[1]

Before proceeding to inquire more minutely when the case does or does not amount to "equivocation," let us pause to consider the nature of this "evidence of intention," as it is sometimes called, and the reasons for its exclusion in all cases save one.

It will be remembered that the ultimate object of judicial interpretation is to ascertain the meaning of the words as used by the writer, or, as it is sometimes put, the intention of the writer as expressed in the words. Now, as the will must be in writing, no other intention than that contained in the will itself can be recognized by the court as operative and dispositive; and it might be thought that the testator's actual intention, established by the testimony of witnesses as to his extrinsic declarations, an intention outside of the will, and which might never extend to the point of executive volition, and which might exist though no will was in fact ever made, must, in the nature of the case, be irrelevant and inadmissible in evidence. But the truth is, that such intention, when a will has been made and a difficulty arises in its interpretation, is admissible in evidence on the same ground on which it is allowed to prove the surrounding facts and circumstances, viz.: as being evidential in its nature and tending to

[1] For more recent cases of equivocation, see *Bodman* v. *American Tract Society*, 9 Allen (Mass.), 447, where the bequest was to "The American Tract Society," and there were two societies bearing that corporate name; and *Gilmer* v. *Stone*, 120 U. S., 586, where a bequest was of "the remainder of my estate to be equally divided between the board of foreign and the board of home missions," it appearing that various churches have boards of home and foreign missions. The ambiguity in this case, however, was removed by aid of the facts and circumstances without resort to declarations of intention. And see *Phelan* v. *Slattery*, 19 L. R., Irish, 177, concerning which the following statement is taken from Thayer's Cases on Evidence, p. 1045, note: "A devise to my nephew, where there were several nephews, was allowed to carry the property to one of them, Thomas Dee (1) on evidence of merely explanatory facts, which the Vice-Chancellor declared to be sufficient by itself; and (2) on the testator's direct statements of intention, furnished by the solicitor who drew the will. 'This evidence,' it was held, 'is admissible here, as the case is one where the extrinsic evidence has shown that the description in the will is alike applicable, with legal certainty, to not only Thomas Dee, but to one or more other nephews.'" See also *Bennett* v. *Marshall*, 2 K. & J., 740; *Lee* v. *Pain*, 4 Hare, 249; *re* The Clergy Society, 2 K. & J., 615; *Doe* v. *Allen*, 12 Ad. & E., 451.

show the meaning of the words as used by the testator. For, in the language of Lord Abinger (in *Hiscocks* v. *Hiscocks*, 5 M. & W., 363): "The intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which in their ordinary sense may properly bear that construction." Thus an inference is drawn from the actual intention, used evidentially, to the operative intention, expressed in the words of the will; and though they are found to coincide, yet the testator's disposition of his property is effectuated by the words of the will and not by the outside (or actual) intention, of which the law takes cognizance as a means to an end, by reason of its probative force, and not as itself the end in view.[1]

But, it may be asked, if this is the true theory on which declarations of intention are received in evidence—if they are really evidential—why are they not admitted in all cases, instead of being limited to the single case of equivocation? The answer is that such evidence is regarded as peculiarly dangerous, and is therefore confined, for reasons of policy, to that one case in which the words of the will describe well, but equally well, two or more

[1] The ground on which declarations of intention are receivable in evidence in the case of "equivocation" has been variously stated. In Wigram on Wills, Pl. 152, it is said: "As to those cases in which the description in the will is applicable indifferently to, and sufficiently describes, more than one subject, the principle upon which they proceed may, perhaps, be explained; for in such cases, although the words do not *ascertain* the subject intended, they do *describe* it. The person held entitled in these cases has answered the description contained in the will. The effect has only been to confine the language to one of its natural meanings. The court has merely rejected; and the intention which it has ascribed to the testator, sufficiently expressed, remains in the will. . . . Or perhaps the more simple explanation is that the evidence only determines what subject was known to the testator by the name or other description he has used." In *Paton* v. *Ormerod*, Probate Division, 1892 (Thayer's Cas. Evid., 1062), it is said: "If two or more objects equally fulfill the description found in the will, in such case, and as Lord Abinger says in *Doe* v. *Hiscocks*, 5 M. & W., 368, in such case only, recourse may be had to the declarations of the testator, because the problem is otherwise insoluble, and because such recourse, under such conditions, constitutes no attempt to vary by parol evidence the terms of the will." And in *Bodman* v. *American Tract Society*, 9 Allen (Mass.), 447, Bigelow, C. J., thus speaks of declarations in a case of equivocation: "Such evidence does not vary the written language. It only enables the court to reject one of the two subjects to which the description applies, and to ascertain which of them the testator understood to be signified by the words used in the will. It is necessarily assumed in all cases where such latent ambiguity arises in the interpretation of a will by the existence of two persons or objects which answer the description given by the testator, that he was ignorant of the fact, or did not remember that the two were known and called by the same name. This assumption rests on the ground that it is reasonable to suppose that if the testator had known

persons or things, and in which the judicial expositor might well exclaim with Captain Macheath in the "Beggar's Opera":

> "How happy could I be with either,
> Were t'other dear charmer away."

The will "sees double," and the effect of the evidence is to correct this defect of vision by rejecting one of the two objects to which the description applies, whereby the other becomes at once ascertained, as described by the words as used by the testator.

Declarations of intention are receivable, therefore, in one case only, and that is when each of a plurality of subjects or objects follows and fills out the description in the will; and when declarations in favor of either will accord with the words in the will. In all other cases they are rejected, as the law will not permit verbal declarations to influence the construction of the will, much less to compete with the written declarations contained therein. As has been well said: "Evidence so nearly allied in character to that furnished by the will itself presents an aspect of rivalry to the will which raises a presumption against its reception. . . . Again, evidence of this kind presents peculiar facilities to fraud. It may easily be imagined or invented;

of the existence of two objects bearing the same name he would have made the description more definite, so as to remove the ambiguity. The law permits oral evidence to be introduced in such cases for the purpose of showing which subject was known to the testator, or which he had in mind when he inserted the name in his will." Mr. Wharton (on Evid., s. 992,) disposes of the difficulty as follows: "When it is doubtful as to which of two or more extrinsic objects, a provision in itself unambiguous, is applicable, then evidence of a testator's declarations of intention is admissible; not, indeed, to interpret the will, for this is on its face unambiguous, but to interpret the extrinsic objects. When this is done the court, so it held, applies the will by determining which of these extrinsic objects it designates." In *Tucker* v. *Seaman's Aid Society*, 7 Metc. (Mass.), 188, it is said by Shaw, C. J., speaking of a devise of "my manor of Dale" to my nephew, John Smith, "when the testator has two manors of Dale, and two nephews named John Smith, perhaps it would be more consistent with principle, if this were a new question, to hold that such a bequest [devise?] is void for uncertainty, and so let in the heir; it being in truth impossible to see by the will which nephew took or which estate passed. But as the will does clearly describe a particular estate, and names a person in being as the object of the testator's bounty, it was early held as the legal construction of the statute that from the necessity of the case extrinsic evidence must be admitted to show which was intended." But the true doctrine is believed to be that, on principle, declarations of intention would always be admissible as explanatory of the testator's words; and their exclusion in other cases than that of "equivocation" is the result merely of a rule of evidence based on public policy. See "The 'Parol Evidence' Rule" (by Prof. Thayer), 6 Harv. Law Review, 417; Thayer's Cas. on Evid., p. 1014–1019; Hawkins on Wills, p. 8, *et seq.*

and, when fraudulently produced, is difficult of detection. If a witness swears that a deceased testator, in a private interview, explained to him the sense in which he wished some clause of his will to be understood, such evidence, however false, cannot possibly be disproved."[1] But with regard to the extrinsic proof of facts, it is added: "It is obvious that there is not the same danger of fraud in the employment of evidence of this nature as in the case of direct proof of intention. The facts upon which arguments are founded, bearing indirectly on the question of interpretation, are generally either matters of notoriety or such as may be proved without any extraordinary difficulty. The proof of the testator's condition in life, of the nature and extent of his property, of the circumstances of his family, of the relation in which he stood to any person named in his will, is not accompanied with any particular uncertainty or any extraordinary temptation to fraud and perjury. Again, facts of this kind do not assume any aspect of rivalry with the declarations of the will. They are altogether different in character, and the knowledge of them merely tends to place the interpreter, according to the expression so frequently used, in the position of the testator, and to enable him to scan the language from the same point of view." (2 Jurid. Soc. Papers, p. 359, Article by F. M. Nichols, Esq.)[2]

Another reason, no doubt, for the law's jealousy and distrust of the testator's declarations, except in the case of equivocation,

[1] For an elaborate statement of the objections to declarations of intention in aid of the interpretation of wills see 2 Wharton Evid., § 992.

[2] It should be borne in mind that the "declarations of intention" considered in this paper are such only as are offered as bearing upon the interpretation of the words of the will; and that no reference is made to the use of declarations of intention upon the issue of fraud in procuring a will, undue influence, and the like. For a discussion of this use of such declarations see 1 Redf. on Wills, p. 548, *et seq.*; 2 Wharton on Evid. s. 1012. Nor is it within the scope of this paper to discuss the cases in which declarations of intention are admissible "to rebut an equity," as the phrase is. See on this subject 1 Greenleaf Evid., s. 296; 2 Taylor Evid., s. 1227, *et seq.*; 1 Redf. Wills, p. 642, *et seq.* And it should further be remembered that while on the question of interpretation declarations of intention are not admissible except in the case "equivocation," yet collateral facts may be proved by the testator's declarations, and these may affect indirectly the interpretation. In the language of Wigram (Ext. Evid. Pl. 104): "Declarations by the testator on a point collateral to the question of intention may, however, be evidence of an independent fact material to the right interpretation of the testator's words." And see Wigram, Pl. 195, where it is stated that such declarations are not confined to the case of equivocation. See, also, 2 Taylor Evid., s. 1210; Hawkins Wills, p. 10. But see 1 Greenleaf Evid., s. 291, where it is erroneously said that "declarations tending to prove a material fact collateral to the question of intention, where such

is the fear that the court of construction, if allowed to know the testator's actual intention—to see in advance the answer to the problem of interpretation—would, though professing to use the intention evidentially only, be tempted to strain the meaning of the words unduly so as to make them fit the actual intention—to force the answer, as it were, and thus to allow "conjectural interpretation to usurp the place of judicial exposition." Examples of this are not wanting under the older decisions in England, which permitted the use of declarations in cases where they are not now allowed. See *Beaumont* v. *Fell*, 2 P. Wms., 140. And in *Langston* v. *Langston*, 2 Cl. and F. 194, Lord Brougham, with characteristic curiosity, peeped at the answer; *i. e.*, he looked at the draft of the will, though confessing he had no right to do so (the case not being one of equivocation), and his interpretation accorded precisely with what he found there, though he protested earnestly that he had laid the draft "entirely out of view."[1] In the case of "equivocation," however, whatever

facts would go in aid of the interpretation of the testator's words," are confined to these cases only, "in which the description in the will is unambiguous in its application to any one of several subjects"—*i. e.*, to the case of equivocation.

Returning to declarations of intention in aid of the interpretation of the words of a will, it is now settled in England that they are equally admissible, in a case of equivocation, whether they were made before, at, or after the making of the will. In the language of Taylor (on Evid., s. 1209): "Where declarations of intention are receivable in evidence the rule most consistent with modern authorities seems to be that their admissibility does not depend on the time when they were made. Contemporaneous declarations will certainly be entitled, *cæteris paribus*, to greater weight than those made before or after the execution; but in point of law no distinction can be drawn between them; unless the subsequent declarations, instead of relating to what the declarant had done, or had intended to do, by the instrument written by him, were simply to refer to what he intended to do, or wished to be done at the time of speaking. Neither will the admissibility of the declarations rest on the manner in which they were made, or on the occasions which called them forth; for whether they consist of statements gravely made to the parties chiefly interested, or of instructions to professional men, or of light conversations, or of angry answers to the impertinent inquiries of strangers, they will be alike received in evidence, though the credit due to them will, of course, vary materially according to the time and circumstances." See also 1 Jarm. Wills, 756; 1 Redf. Wills, 562, *et seq.*; Hawkins Wills, p. 13; 2 Wharton Evid., s. 988; Browne Parol Evidence, pp. 478–488; *Doe* v. *Allen*, 12 Ad. & E., 455; *Hawkins* v. *Garland's Ad'mr*, 76 Va., 149. But it was once held in England that the declarations must be contemporaneous with the making of the will (*Thomas* v. *Thomas*, 6 T. R., 671), and the law is so laid down in Wigram, Ext. Evid., Pl. 187; and there are some American cases to the same effect. See Browne Parol Evid., *ubi supra*.

[1] See *Grant* v. *Grant*, L. R. 5, C. P. 727, where, referring to *Langston* v. *Langston*, Blackburn, J., does not hesitate to say: "I have always entertained a notion that the sight of the draft had something to do with the decision."

result is reached must conform to the language of the will; and while the declarations have, as between the claimants themselves, both equally described by the words, the important effect of excluding the one in favor of the other, yet the decree of the interpreter is that a person named in the will is entitled to take; and this, it is thought, can do no violence to its language.[1]

Let us now return to the important inquiry, What is an equivocation—the one case in which the law tolerates "declarations" outside of the will, and is not affrighted at the dread apparition of the testator's "actual intention," as it is called? In the language of Bacon, an equivocation arises "when one name and appellation doth denominate divers things." By Wigram's seventh proposition, "evidence of intention" is admissible only "when the object of the testator's bounty or the subject of disposition (*i. e.*, the person or thing intended) is described in terms applicable indifferently to more than one person or thing." According to Taylor (on Evid., s. 1206) the declarations of the testator are receivable in evidence in but one case—viz., when it appears that

[1] The rule of evidence by which declarations of intention are allowed in the case of "equivocation," and excluded in all other cases, has not altogether escaped criticism. Thus in *Charter* v. *Charter*, L. R., 7 H. L. C., 304 (which was not a case of equivocation), Lord Selborne says: "If the direct evidence of intention which has been offered by the respondent, independently of the light thrown by extrinsic facts upon the words of the will, could properly be regarded, there would be no difficulty; but I think we are compelled to hold, after *Doe* v. *Hiscocks*, 5 M. & W., 363; *Bernasconi* v. *Atkinson*, 10 Hare, 345, and *Drake* v. *Drake*, 8 H. L. C., 172, that the court below was wrong in receiving that evidence. Why the law should be so in cases where some error of description involving a latent ambiguity has to be corrected, when evidence of the same kind is admitted in what Lord Bacon describes as cases of 'equivocation' (Maxims of the Law, Rule XXIII,) [more usually numbered XXV], I am not sure that I clearly understand; but it has been conclusively so settled by a series of authorities to which we are bound to adhere." And in "Stephen's Digest of the Law of Evidence," App'x, Note XXXIII, it is said: "The strictly logical course, I think, would be either to admit declarations of intention both in cases falling under paragraph 7 [of Art. 91, where the document applies in part, but not with accuracy, to the circumstances of the case], and in cases falling under paragraph 8 [cases of equivocation], or to exclude such evidence in both classes of cases, and to hold void for uncertainty every bequest or devise which was shown to be uncertain in its application to facts." In Taylor on Evid., s. 1217, it is said: "It must, however, be remembered that in cases of this nature [*i. e.*, where part of the description answers to one claimant and the remainder applies to another. See s. 1215] the court—fettered by a rule which would be regarded as absurd in the ordinary affairs of life—cannot receive any declarations of the testator as to what he intended to do in making his will. This was the precise point determined in the leading case of *Doe* v. *Hiscocks*." And see 1 Redfield on Wills, p. 618, note 29, at end, where the author speaks of the rule which rejects "direct proof of intention" in cases other than those of equivocation as "excluding the most reliable portion of the evidence."

the description in the will is "alike applicable with legal certainty to two or more persons or things." And in *Charter* v. *Charter*, L. R. 7, H. L. 364 (decided in 1874), it is said by Lord Chancellor Cairns: "The only case in which evidence of this kind [*i. e.*, parol evidence of statements of the testator] can be received is where the description of the legatee or of the thing bequeathed is equally applicable in all its parts to two persons or to two things." And in *Patch* v. *White*, 117 U. S., 211, 217, it is said by Mr. Justice Bradley, speaking for the court, that the kind of ambiguity which may be removed by the declarations of the testator is "when there are two persons or things equally answering the description." And in *Senger* v. *Senger*, 81 Va., 687, 695, Judge Richardson thus summarizes the language of Judge Lee in *Wooton* v. *Redd*, 12 Gratt., 196, 207: "Declarations of the testator as to his intention to make a particular bequest, or that he had made such a bequest, is not competent evidence except where the terms in the will indifferently and without ambiguity apply to each of several different things or persons, when evidence may be received as to which of the subjects or persons so described was intended by the testator."[1]

From these authorities (and many others) it is established that in order to amount to a case of equivocation the language of the will must satisfy these two conditions:

1. The words of the will must be descriptive of concrete ob-

---

[1] In 1 Jarman, Wills (483), the opinion is expressed that though a case of equivocation should exist in a will, yet no evidence of oral declarations by the testator respecting his intention would be admissible if the surrounding circumstances disclosed reasons for the testator's preferring one person to another of the same name; and this on the ground that "there is properly no ambiguity until all the facts of the case have been given in evidence and found insufficient for a definite decision." But it is not believed, when the case is otherwise proper for the admission of declarations of intention, that they are excluded, because, without them, the doubt could be resolved in one way on the facts and circumstances; but that the declarations are entitled to be received along with the facts, and this whether they corroborate the inferences to be drawn from the facts or oppose such inferences. It does not seem reasonable that a decision should be made as between competing claimants, equally described by the words of the will, by the feeble light afforded by facts suggesting a preference by the testator for one over the other, when the testator's express declarations are opposed to such an inference. The true doctrine is that facts and declarations should both be received, and then on the whole evidence the judge must decide whom the testator meant by the words he has used. See this view taken in Wigram Ext. Evid., p. 118, by O'Hara. See also Stephen's Dig. Evid., Art. 91. And there is no suggestion in any of the recent decisions that in a case of equivocation the declarations are to be excluded until the facts have been appealed to in vain to remove the ambiguity.

jects; that is, if some person or thing whose identification is the purpose of the declarations of intention. Such declarations are not now allowed (though it was formerly otherwise in equity[1]) to explain the meaning of ambiguous expressions in a will, not even if "the words stand *in æquilibria*, and are so doubtful that they may be taken one way or the other." Nor are they allowed to explain generic terms, to show the extent of their meaning as employed by the testator. Such difficulties must be solved by construction, aided, it may be, by light from the surrounding facts and circumstances, but the case is not one of "equivocation" in the true sense, and no declarations of intention are receivable. (See Wig. Ext. Ev., Pl. 209; 2 Whart. Ev., s. 993.) And it is on this principle that declarations of intention cannot be received to show the meaning of the word "increase" in a bequest of "a negro woman, named Jenny, and her increase" (*Puller* v. *Puller*, 3 Rand., 83, explaining *Reno* v. *Davis*, 4 Hen. & M., 283); nor to show, under a devise of "all my estate to be equally divided between the children of my deceased son Joseph and the children of my daughter Elizabeth," that the children of Joseph and Elizabeth were meant to take *per stirpes* and not *per capita*. (*Senger* v. *Senger*, 81 Va., 687.)

2. The description in the will must be equally applicable in all its parts to two or more persons or two or more things. For unless there be a plurality of objects or subjects, if the doubt arises as to a single person or a single thing supposed to be described, though imperfectly, by the words of the will, there can be no competition between subjects or objects, and without competition there is no equivocation. And though there are several competing subjects or objects, yet if no one of them "follows out and fills the words in the will," but the description applies in part to the one and in part to the other, this is no case of equivocation, and declarations of the testator's intention are inadmissible. For this is not a case of double vision, where the will describes well, but equally well, two or more persons or things, but rather a case of verbal strabismus, where the description in the will squints, looking partly

[1] See *Pendleton* v. *Grant*, 2 Vern., 517; *Strode* v. *Russell*, 2 Vern., 620; *Hampshire* v. *Pierce*, 2 Ves. Sr., 216; Wigram on Wills, Pl. 109.

in one direction and partly in the other. The description is balanced, and while the equipoise may be broken and a decision made between the repugnant parts of the description by the aid of surrounding facts and circumstancs, the case is not one which admits of the law's heroic treatment by the admission of declarations of intention. This was decided in the great case of *Hiscocks* v. *Hiscocks*, 5 M. & W., 363, and has been followed in England in *Drake* v. *Drake*, 8 H. L. C., 172, and *Charter* v. *Charter*, L. R., 7 H. L. Cas., 364, and is now regarded as settled law. Thus, in *Hiscocks* v. *Hiscocks*, *supra*, the devise was "to John Hiscocks, eldest son of my son John Hiscocks." But the eldest son of John Hiscocks was not named John, but Simon, so that while the name fitted one son the description fitted another; and it was held that no declarations of intention could be received in aid of the interpretation.[1]

But the strict letter of the above rule has been so far relaxed as to permit a case of equivocation to be made under the maxim *falsa demonstratio non nocet cum de corpore constat*, when, after rejecting the misdescription, which is applicable to no person or

[1] *Hiscocks* v. *Hiscocks* is one of a number of cases in which the name in the will fits one claimant and the description another; and it was formerly thought that in the absence of evidence the name would be presumed correct, and that the description would be rejected as erroneous, and that this was the meaning of the maxim *veritas nominis tollit errorem demonstrationis*. But this doctrine is now exploded in England. Thus in *Drake* v. *Drake*, 8 H. L. C., 172, 179, it is said by Lord Chancellor Campbell: "There is a maxim that the name shall prevail against an error of demonstration; but then you must first shew that there is an error of demonstration, and until you have shown that, the rule *veritas nominis tollit errorem demonstrationis* does not apply. I think there is no presumption in favor of the name more than of the demonstration. Upon referring to the numerous cases that have been cited at the bar it will be found that there are more instances in which the demonstration prevailed than in which the name prevailed." And see this language quoted with approval by Lord Cairns in *Charter* v. *Charter*, L. R., 7 H. L. C., 364, 381. See, also, 2 Taylor Evid., s. 1215. The disposition made by the court of *Hiscocks* v. *Hiscocks* (which was an action of ejectment) was as follows: "Upon the whole, then, we are of opinion that in this case there must be a new trial. Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is to determine whether the description means the lessor of the plaintiff or the defendant. The description in fact applies partially to each, and it is not easy to see how the difficulty can be solved. If it were *res integra*, we should be much disposed to hold the devise void for uncertainty, but the cases of *Doe* v. *Huthwaite* [3 B. & Ald., 632], and *Bradshaw* v. *Bradshaw* [2 Y. & C., 72], and others, are authorities against this conclusion. If, therefore, by looking at the surrounding facts to be found by the jury, the court can clearly see, with the knowledge that arises from these facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide and direct the jury accordingly; but we think that, for this purpose, they [it] cannot receive declarations of the testator of what he intended to do in making his will."

thing, the remainder of the description is sufficient to describe equally and with legal certainty two or more persons or two or more things. Thus, in *Careless* v. *Careless*, 1 Mer., 384, the devise was " to Robert Careless, my nephew, son of Joseph Careless." The testator had no brother Joseph, so that the words " son of Joseph Careless " were rejected as " false demonstration." This left the description: " To Robert Careless, my nephew "; and as the testator had two nephews named Robert Careless, the case was treated as an equivocation.[1]

In the light of the foregoing principles let us consider the case of *Hawkins* v. *Garland's Adm'r*, 76 Va., 149, in order to determine whether it presents a case of equivocation, and whether the testator's extrinsic declarations of intention were properly received in evidence. By the fifteenth clause of his will Samuel Garland, Sr., bequeathed as follows: " I give to each of my namesakes, Samuel G. Slaughter, son of Ch. R. Slaughter; Samuel G. White, son of Samuel G. White; Samuel, son of S. Garland, Jr., and Samuel G., son of Captain John F. Slaughter, a bond of $1,000 of S. S. railroad."

The difficulty arose as to the person intended by " Samuel G., son of Captain John F. Slaughter." At the date of the will, and for three or four years thereafter, there was no son of John F. Slaughter named Samuel G., but a few months before the testator's death a son was born to John F. Slaughter who received that name. Hence the court very properly rejected the claim of " Samuel G., the son of Captain John F. Slaughter," and treating " Slaughter " as a manifest mistake, were called on to consider whom the testator intended to describe by the residue of the description—viz., " Samuel G., son of Captain John F." And upon reasoning to which there is no objection, based on the language of the will read in the light of the facts of the case, the court was of opinion that Samuel G. Hawkins, son of Captain John F. Hawkins, was plainly indicated as the object of the testator's bounty. But the court went further, and admitted in evidence the parol declarations of the testator that Samuel G. Hawkins was one of the namesakes to whom he had given $1,000 by his will. And in this, it is submitted, the court erred; for the

[1] See Hawkins on Wills, pp. 8 to 18, as to what constitutes an equivocal description.

words "Samuel G., son of Captain John F. Slaughter," do not, either before or after the rejection of "Slaughter," describe well, and equally well, two or more persons. As there was no son of John F. Slaughter named "Samuel G." in existence at the date of the will, the after-born son cannot be considered as described at all by the words in the will; and rejecting "Slaughter," only Samuel G. Hawkins could claim by the description, "son of Capt. John F." In truth, the case was a simple one of misdescription, without the appearance even of equivocation; and while the result reached was no doubt correct, the court should have reached it on the facts, without the aid of the testator's extrinsic expressions of intention, as was done by the Supreme Court of the United States in *Patch* v. *White*, 117 U. S., 210—a case quite similar to *Hawkins* v. *Garland*, with the difference that in *Patch* v. *White* the misdescription was of the *subject* devised, and not of the object of the testator's bounty.[1]

[1] In *Patch* v. *White*, *supra*, the testator devised to his brother Henry a lot in the city of Washington, described as "lot number six, in square four hundred and three, together with the improvements thereon erected and appurtenances thereto belonging." The testator did not own lot 6 in square 403, but did own lot 3 in square 406, and this lot was claimed as that meant by the testator. It was conceded that this was not a case for declarations of intention, but it was held by the court that, rejecting the mistaken numbers as false demonstration, there remained, in the light of the facts, a sufficient description in the will to give legal certainty. In the language of Mr. Justice Bradley: "The will on its face, taking it all together, with the clear implications of the context, and without the misleading words 'six' and 'three,' devises to the testator's brother Henry in substance as follows: 'I bequeath and give to my dearly beloved brother, Henry Walker, forever, lot number ——, in square four hundred and ——, together with the improvements thereon erected and appurtenances thereto belonging—being a lot which belongs to me, and not specifically devised to any other person in this will.' In view of what has already been said, there cannot be a doubt of the identity of the lot thus devised. It is identified by ownership, by its having improvements on it, by its being a square the number of which commenced with four hundred, and by its being the only lot belonging to the testator which he did not otherwise dispose of. By merely striking out the words 'six' and 'three' from the description of the will, as not applicable (unless interchanged), to any lot which the testator owned; or instead of striking them out supposing them to have been blurred by accident so as to be illegible, the residue of the description, in view of the context, so exactly applies to the lot in question that we have no hesitation in saying that it was lawfully devised to Henry Walker."

It seems remarkable that so sound a decision as this was dissented from by four of the justices, on the ground that the words "lot 6 in square 403" did describe a certain lot in the city of Washington, and the fact that it did not belong to the testator was a matter of no consequence—if the facts did not fit the will, so much the worse for the will. And it was said by Mr. Justice Woods, dissenting: "The only ground on which the plaintiff can base his contention that there is a latent ambiguity in the de-

In *Hawkins* v. *Garland*, the case of *Maund* v. *McPhail*, 10 Leigh, 199, is cited, where declarations of intention were received to show that by "the new colonization society in Africa" the testator meant "The American Colonization Society for settling free persons of color in Africa." But this was clearly wrong, as the case was one of misdescription only. And as to the English case of *Beaumont* v. *Fell*, 2 P. Wms., 141, relied on by the court in *Hawkins* v. *Garland*, where, in the absence of equivocation, declarations of intention were received, that has long since been overruled on this point. (See *Hiscocks* v. *Hiscocks*, 5 M. & W., 363; *Mostyn* v. *Mostyn*, 5 H. L. C., 168; 1 Jarm. Wills, 760, note 2; 2 Taylor Evid., s. 1211, note 2.)[1]

I cannot close this imperfect discussion without a particular reference to the two authorities oftenest cited on questions of construction by parol evidence; I mean the celebrated Maxim and Commentary of Lord Bacon as to Ambiguities Patent and

vise, is his offer to prove that the testator did not own the lot described in the devise, but did own another which he did not dispose of by his will. This does not tend to show a latent ambiguity. It does not tend to impugn the accuracy of the description contained in the devise. It only tends to show a mistake on the part of the testator in drafting his will. This cannot be cured by extrinsic evidence." And this view of the matter was taken in the well-known case of *Kurtz* v. *Hibner*, 55 Ill., 514 (S. C., 8 Am. Rep., 665), where there was a mistake similar to that in *Patch* v. *White*. But this mode of dealing with such mistakes is now thoroughly discredited. As has been well said (6 Harv. L. Review, p. 435, note): "The true view of such a case appears to be that there is no question of ambiguity in the matter. There is a mistake and the question is whether the will taken as a whole admits of a construction that will correct the mistake. All extrinsic facts which serve to show the state of the testator's property are receivable, and then the inquiry is whether in view of all these facts anything passes." And see Browne, Parol. Evid., p. 452. Such cases of mistake have been very frequent in some of the Western States because of the practice of designating property by range, township, section, and quarter section.

[1] Some of the early English cases, in addition to *Beaumont* v. *Fell*, *supra*, admit declarations of intention in cases other than those of equivocation. See 1 Jarm., Wills, (486). But these cases are overruled by *Hiscocks* v. *Hiscocks*, *supra*, which is followed by the recent English cases. And there are American cases in other States besides Virginia where *Beaumont* v. *Fell* has been followed. See Hawkins on Wills, p. 9, note 1, where it is said by the American editor: "In many American cases it is stated that parol evidence [*i. e.*, of declarations of intention] is admissible in all cases of latent ambiguity, such as misdescription (without any equivocation), &c. But it is conceived that this statement arises from an omission to observe the distinction between evidence of the state of the testator's property or family, or of his surrounding circumstances, in aid of the construction of the will and direct evidence of the testator's intention." And in Wharton Evid., s. 993, the author, referring to the early English cases, says: 'But these cases are now discredited, and with them should fall the American rulings to which they for a time gave rise."

Latent, and the excellent treatise of Sir James Wigram on Extrinsic Evidence in Aid of the Interpretation of Wills.

1. The familiar maxim of Lord Bacon (Regula XXV.), written about the year 1596, is as follows:

Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur.

It will be seen that the maxim itself speaks only of a latent ambiguity (*i. e.*, one not apparent on the face of the writing), and declares that it may be holpen by averment; "for when an ambiguity arises out of the facts it may be removed by averment of facts." But in his commentary on the maxim, Bacon speaks also of a patent ambiguity (*i. e.*, one apparent on the face of the writing), and declares that it is "never holpen by averment." And as to latent ambiguities, the commentary proceeds to make a distinction that does not appear in the maxim itself; and they are divided into two classes—viz., (1) the case of "equivocation," where averment of intention is allowed, and (2) the case of "variance," (*i. e.*, imperfect description), when facts may be averred, but not intention, "because it does not stand with the words."

Of Bacon's maxim, it is finely said by Professor Thayer of Harvard University (6 Harv. L. R., 437): "The great name of the author gave it credit. It seemed to offer valuable help towards settling the troublesome question as to how far you could go in looking at outside facts to aid in construing a written text. To say that a difficulty which was revealed by outside facts could be cured by looking further into such facts had a reasonable sound; and when it was coupled with a rule that you could not in any way remedy a difficulty which was apparent on the face of the paper, there seemed to be a complete pocket precept covering the whole subject. . . . The maxim caught the fancy of the profession, and figured as the chief common place of the subject for many years. It still performs a great and confusing function in our legal discussions."

The maxim of Lord Bacon has undoubtedly caused much of the confusion that is to be found in the cases on extrinsic evidence. For, as to latent ambiguities, the maxim itself does not draw any distinction between the case of "equivocation" and the case of

"variance" or misdescription; and the courts frequently quote it as authorizing averments of intention (*i. e.*, declarations of intent) in all cases of a latent ambiguity. But it would seem that in the maxim Bacon is not thinking of averment of intention at all, but only of facts; for to the declaration that a latent ambiguity may be helped by averment he adds the reason, that an ambiguity arising from facts may be removed by facts. But in his commentary on the maxim Bacon does not confine himself to this homœopathic treatment of ambiguities—*similia similibus curantur;* but in the case of equivocation—"where one name and appellation doth denominate divers things"—declares that the remedy may come from averment of intention as well as of facts. When, therefore, it is said that "a latent ambiguity may be holpen by averment," the proposition itself is ambiguous, and requires careful discrimination as to the use of the words "ambiguity" and "averment," in order to avoid misconception. For ambiguities, though latent, may be so either by reason of equivocation or by reason of variance (misdescription), and averments may be of facts only, or of intention. Now, all latent ambiguities may be helped by averment of facts; but only in the single case of equivocation can resort be had to averment of intention. And it will be found that this equivoque in the use of the words "ambiguity" and "averment" (or in modern phrase "parol evidence"), is common in the cases and text-books at the present time. It is greatly to be desired, in order that those who write of ambiguities may not themselves be ambiguous,[1] that the sort of ambiguity and of averment should in all cases be plainly expressed; and that such misleading expressions as "parol evidence is admissible to explain a latent ambiguity," or "the court may receive parol evidence of the intention of the testator," and the like, should be eschewed

[1] In this connection it may be observed that in the cases on the admissibility of extrinsic evidence the word "ambiguity" is used to signify any defect whatever in the words of a will—not merely the case of "equivocation" where the words are "sensible in more senses than one" (Wigram, Pl. 210), but cases of misdescription as well, and even where the testator has left a blank in his will, or accidently made a material omission. See *Miller* v. *Travers*, 8 Bing., 244. It would be well for judges and text-writers to bear in mind the weighty observation of Locke: "If men will not be at the pains to declare the meaning of their words, and definitions of their terms are not to be had, yet this is the least that can be expected, that in all discourses wherein one man pretends to instruct or convince another, he should *use the same words constantly in the same sense.*"

altogether. For, in the latter case, all parol evidence is, in a sense, "of the intention of the testator"; and the doubt arises whether declarations of intention are meant, or only facts and circumstances from which that intention may be inferred.

But it is as to patent ambiguities that the maxim of Bacon has caused "confusion worse confounded." The maxim itself implies that only latent ambiguities are holpen by averment; and the commentary confirms this by expressly declaring that patent ambiguities are never thus holpen. And the cases are to this day full of dicta to the effect that patent ambiguities are beyond the aid of extrinsic evidence; and even some of the decisions profess to proceed on this principle. But it must be manifest on a moment's reflection that the fact that a difficulty is apparent on the face of a writing is not of itself sufficient to bar the door against extrinsic evidence explanatory of the writer's meaning; and that the same doctrines should apply to all ambiguities, whether patent or latent, admitting evidence of the facts and circumstances in all cases, and of declarations of intention in the one case of equivocation. And that this is the law as to "facts and circumstances" to explain a patent ambiguity is established by the authorities;[1] and there are not wanting decisions directly in point that in the case of a true equivocation apparent on the face of a will declarations of intention are also admissible; and the fact that the equivocation is patent is immaterial. Thus in *Doe d. Gord* v. *Needs*, 2 M. & W., 129, the will showed on its face that there were two George Gords, viz: George, the son of George Gord, and George, the son of John Gord. Then followed a devise to "George Gord the son of Gord"—thus making a patent ambiguity, and yet it was held that declarations of the testator were admissible; and Parke, B., speaking for the court, repudiated the idea that the fact that the ambiguity was patent could affect the rule which permits extrinsic expressions of intention when the words of the will describe well, but equally well, two or more persons or things. And to the same effect is the case of *Doe* v. *Morgan*, 1 Cr. & M., 235. And see *Hill* v. *Felton*, 47 Ga., 455 (15 Am. Rep., 643).

[1] See Wigram Ext. Evid. Pl. 80, 203; 1 Jarm. Wills, p. 745; Browne on Parol Evid., §§ 49, 126; *Colpoys* v. *Colpoys*, Jacob, 451; *Goblet* v. *Beechey*, 3 Sim., 24.

It seems, then, notwithstanding Bacon's maxim, that there is at the present day no real difference in the rules of law governing patent and latent ambiguities, and the most careful text-writers avoid the use of the terms altogether. In the language of Professor Thayer, from whom I have above quoted (6 Harv. Law Review, 424), "Ambiguities or any other difficulties, patent or latent, are all alike as regards the right and duty to compare the documents with extrinsic facts, and as regards the possibility that they may vanish when this is done. As to the resort to direct statements of intention in the one case of equivocation, viz.: where there are more than one whom the name or description equally fits, the right to resort to these declarations in such cases in no way depends on the difference between what is patent and latent."[1]

2. The Essay of Sir James Wigram on Extrinsic Evidence first appeared in 1831, and the Seven Propositions which are the text

[1] Both Wigram and Stephen discuss the subject of extrinsic evidence when there is a writing without the aid of Bacon's maxim, and without the use of the expressions patent and latent ambiguities. Taylor (on Evid., s. 1212) quotes the maxim and a part of the commentary, but he adds (s. 1218): "The above quotation from Lord Bacon's works has been cited more out of respect to that great man than in the expectation that it will afford much practical information." And in Browne's Parol Evid., Preface, p. V, it is said: "It is also noteworthy that the ancient distinction between patent ambiguities and latent ambiguities, founded on a scholastic refinement by Lord Bacon, and echoed parrot-like and senselessly followed by generations of modern judges, has been effectually done away." And see s. 126, where the law is stated as to wills without making any distinction between patent and latent ambiguities. See, however, s. 49, where "mere evidence of intention" is declared incompetent in respect to a patent ambiguity. The context shows that the author's statement in s. 49 refers to contracts, deeds, &c., while s. 126 is applicable to wills only. It is not believed, however, that such a distinction between wills and other written instruments can be sustained. In Chaplin on Wills (quoted in Browne on Parol Evid., p. 488), it is said: "Thus it appears that extrinsic evidence of the *facts* is admitted in all cases of both patent and latent ambiguities; while extrinsic direct evidence of *intent* is admissible in only one class of latent ambiguities." The author here excludes "declarations of intention" where a case of "equivocation" is apparent on the face of the will; but in saying that such declarations are inadmissible because the equivocation is patent he is in direct opposition to the case of *Doe* v. *Needs*, 2 M. & W., 149. Wharton alone among the text-writers accepts the doctrine of Bacon in its entirety. He says (s. 956): "The admission of evidence to explain ambiguities is confined to such ambiguities as are latent." And his supposed reason seems to be that "a patent ambiguity is subjective—that is to say, an ambiguity in the mind of the writer himself; while a latent ambiguity is objective—that is to say, an ambiguity in the thing he describes." There are no doubt some cases of patent ambiguity where no definite intention exists in the mind of the writer, and such cases, of course, cannot be "holpen by averment." See Wigram Ext. Evid., s. 209; *Breckenridge* v. *Duncan*, 2 A. K. Marshall, 50 (12 Am. Dec., 359). But it is not true that every patent ambiguity indicates

of his discussion are familiar to every lawyer.[1] He rejects Lord Bacon's maxim as his guide, on the ground that "the maxim itself requires much explanation"; though, in conclusion, he endeavors to show, by what amounts to a *tour de force*, that the maxim, properly understood, is not in conflict with the Seven Propositions. The keynote of Wigram's book is the correct principle—"that the judgment of a court, in expounding a will, should be simply declaratory of what is in the instrument;" but his work is marred by his failure to see clearly that actual intention, outside of the will, may be truly evidential, as forming a basis of inference as to the operative intention expressed in the words; and by the grudging reception he therefore accords to "declarations of intention," in the casee ven of equivocation. Indeed, so fearful is he of the malign influence of actual intention that he seems to hold that even facts and circumstances, if affected with that taint, are not to be received in evidence save in the one case of equivocation, where even express declarations of intention are receivable. He divides extrinsic evidence into such as is "explanatory of the words themselves," and "evidence of intention itself as an independent fact" as if the latter could not be explanatory of the words; and he speaks constantly of "evidence of intention," instead of "declarations, or statements, or expressions of intention,"

---

an absence of definite intention; and when this is not the case, the mere fact of patency is irrelevant upon the question of the admissibility of extrinsic evidence.

It should be added, in justice to Lord Bacon, that the examples he gives of patent ambiguities show that he had in his mind the facts of the Lord Cheyney's case, 5 Co., 68 (decided in 1591), where declarations of intention were inadmissible (there being no equivocation), and where the doubt was not of a character to be removed by evidence of the facts and circumstances. In practice, indeed, a case would rarely occur, such as *Doe* v. *Needs*, *supra*, where a true equivocation is apparent on the face of the writing, and the possibility of such a case may have escaped Bacon's attention in stating the law as to "averment of intention." And even as to the averment of facts, it may be observed that most cases of ambiguity apparent on the face of wills are not of a character to be relieved by such evidence; so that though the facts are admissible, they are not sufficient to solve the difficulty. But on the other hand there are cases of imperfect description, or misdescription, and even some ambiguous expressions which, though apparent on the face of the will, the facts can relieve, and when this is the case such facts are undoubtedly admissible. See Wigram Ext. Evid., Pl. 209; *Cole* v. *Rawlinson*, 1 Salk., 234; *Abbott* v. *Middleton*, 7 H. L. C., 68; *Smith* v. *Bell*, 6 Pet. 68; *Colton* v. *Colton*, 127 U. S., 300; *Puller* v. *Puller*, 3 Rand., 83; *Hatcher* v. *Hatcher*, 80 Va., 169; *Miller* v. *Potterfield*, 86 Va., 876.

[1] Wigram Ext. Evid., Pl. 12 to 19. The Seven Propositions are quoted in 1 Greenlf. Evid., § 287, note 1.

as if some facts even were not explanatory, but indirectly evidence of intention, and therefore not admissible except in the one case of equivocation. But the law is now settled, as we have seen, that it is not necessary (if, indeed, it were practicable) to divide facts into two classes, those which are "evidence of intention," and those which are not; but that all the material facts and circumstances are in all cases admissible, and the rule of exclusion is confined to declarations of intention, and even these become admissible in the case of equivocation. (See *Drake* v. *Drake*, 8 H. L. C., 172; *Charter* v. *Charter*, L. R., 7 H. L. C., 364.)[1]

In conclusion, it may be permitted me to add that I believe that the rules of law as to the use of extrinsic evidence in aid of the interpretation of wills are founded on sound and enlightened principles, both as to the object of judicial exposition, and the means by which that object may be attained. The judicial expositor seeks to discover, not what the words signify in the abstract and according to the rules of correct speech, but what they mean in the will as used by the testator. With all their imperfections on their head, they may still be pregnant with meaning, if only the interpreter have skill to discover it. And for this purpose he must place himself in the situation of the testator, and read the will in the light reflected from all the facts, not only the objective facts, if I may so call them, but the subjective facts as well; *i. e.*, those disclosing the testator's motives, opinions, and beliefs. The law does not require a perfect written expression of the testator's intention, but only such expression as can be deemed sufficient. It recognizes the truth of the adage *humanum est errare;* and though, for reasons of policy, it requires that a will shall be in writing, yet it allows a wide margin for mistakes. It does not make the writer, like Frankenstein, the slave of his own imperfect creature. It knows, in the language of Dr. Johnson, quoted by the Supreme Court of the United States in *Patch* v. *White*, 117 U. S., 210, that "sudden fits of inadvertence will surprise vigilance; slight avocations will seduce attention, and

[1] In support of the observations which I have ventured to make on the justly celebrated treatise of Wigram, the reader is referred to Pl. 10, 107, 187, and 194; but their correctness can best be tested by a careful study of the whole work.

casual eclipses of the mind will darken learning"; nor is it unfamiliar with that perverse trait by which we mean one thing and say another, for which Richard Grant White has coined the high-sounding name of heterophemy. The judicial expositor, therefore, does not sit aloft on the cold height of an ideal perfection, and survey the written words with a severe and critical eye, careless whether the will fails or not; but after a very human fashion, he seats himself in the arm chair of the testator, puts on his spectacles, scrutinizes the will "by the four corners," reads its words by the light of all the surrounding facts and circumstances, corrects manifest errors, searches diligently for the faintest traces of intention—even receiving, in a proper case, evidence of the testator's extrinsic declarations; and so endeavors to construe the words of the will as the testator used them, bearing ever in mind that great maxim of the law which enjoins kindly, indulgent interpretation, that the will may prevail and not fail—*ut res magis valeat quam pereat.*

PAPER

READ BY

J. ALLEN WATTS.

DUTY OF THE LEGAL PROFESSION IN REGARD TO NEEDED CHANGES IN LEGISLATION.

The student of the history of our profession will be struck through all its periods with this fight against change. The collegiate training of lawyers was bitterly opposed for years; the long, protracted and unaccountable fight made for the preservation of the barbarous jargon, French Law-Latin, is one of the most remarkable and yet most characteristic of the struggles of our profession. Growing into use through the exigencies of the time, it became, in the opinion of the profession, almost a part of the law; abolished in one reign and restored in another, and even to this day phrases and words remaining in use. The fight over special pleading, the different kinds of actions, procedure in chancery and at common law, is still going on. A suitor is still denied justice if he appeals to the chancellor when he should have addressed himself to the judge, and is thrown out of court for no other reason than that he filed a bill instead of a declaration, although justice would be subserved, delay avoided and the general good accomplished by a different procedure.

To quote from the last number of *Green Bag*:

"The same officer sits as chancellor and common law judge, and he deals out common law or equity according to the side from which he is approached. He therefore resembles the heathen god Janus, of the double face, or Mr. Facing-both-ways in the Pilgrim's Progress. By an appeal to his better self he can mitigate

the rigors of the common law by the application of the milder and more beneficent principles of equity. Like Mr. Orator Puff, he has ' two tones to his voice ' ; so, if he finds when approached on his common law face that he is bound to grant the demand of the plaintiff, but feels that it would be unjust and inequitable to do so, he may allow the defendant to prostrate himself beneath his equity face and solicit him to restrain himself from pronouncing the dreaded judgment of his common law mouth. It is like praying the Deity to restrain his wrath, but with a more appreciable result. A Vermont lawyer, Hon. Joel C. Barker, of Rutland, thus describes this marvelous procedure :

"' In Vermont, where the same man presides over the county court and court of chancery in the same county, we often have the judge saying from his high seat of honor and of justice to a suitor : 'The law compels me to decide this case in your favor, and to award you a sum in damages ; but such a judgment would be an insult to God's justice ; you have taken a wicked and mean advantage of your opponent, and your recovery is a wrong and a sin ; but your adversary has no legal defence to your iniquitious persecution of him : therefore, as chancellor, I hereby restrain and enjoin you from proceeding further in your action, and forcing me to do such manifest wrong to your victim.' " This description of the versatility of the legal judge of all work reminds one of Steerforth's description of Doctor Commons, in David Copperfield :

"You shall find the judge in the nautical case the advocate in the clergyman's case, or contrariwise. They are like actors ; now a man's a judge, and now he is not a judge ; now he's one thing, now he's another ; now he's something else, change and change about."

The violent, acrimonious and protracted fight over the laws relating to married women is another familiar instance. They could be multiplied almost indefinitely. That they can be so multiplied is not, in my opinion, a credit to our profession. My purpose here, however, is not that of a critic ; I am not here as a fault-finder, and I do not propose speaking in that spirit. With all our faults, the profession of the law is, perhaps, next that of the teacher, the highest of all professions. It certainly demands

closer application, a brighter intellect, and courage and self-reliance to a degree that is unknown to any other profession. I recognize and appreciate its glorious history, its battles for human right and human freedom; I honor and revere its great leaders, and take an honest pride in being an humble member of such a glorious company. I cannot help realizing, however, that, practically, every department of human knowledge has made greater advancement than have we. The wide domain of science is rapidly extending its boundaries. From the stage coach, the flint lock, the tallow dip and the sailing vessel to the steam or electric car, the repeating rifle and smokeless powder, and cannon capable of destroying cities distant beyond the horizon; to gas and electric light and the leviathans of the sea traversing the Atlantic in five or six days, are enormous strides.

Our hereditary critics, the doctors, have made advances in surgery that border on the marvelous. Even the parsons are progressing. Dr. Briggs, and a large minority of the Presbyterian Church, have announced the doctrine that the Bible is simply a history filled with errors. It is likely that if John Calvin could revisit the glimpses of the moon he would say that this is progress greater than that from the stage coach to the electric car.

In this period of progress and improvement our great profession has lagged too far behind; legislation has not kept step with the progress of the age, and in this country a lawyer is almost as much responsible for legislation as he is for the administration of justice. The people from the earliest times have mistrusted and criticised us. Notwithstanding this, by mere force of intellect, of training and ability, we have in large measure controlled the legislation of the State, and we are justly held responsible therefor. The people are uneasy; unrest and disquietude prevail; there is a feeling prevalent that the laws are not what they should be. That this feeling is justified to a large extent by the facts cannot be successfully controverted.

It shall be my object here to-night, as briefly as I can, to point out what, to me, seem to be some of the defects in our laws and to suggest, as far as I am able, their remedies.

This is a period of improvement or reformation; its spirit has permeated this body, and I hope the time may soon come when

we shall devote ourselves zealously and wisely to the modernizing and equalizing of our laws. There is no question that has occupied so large a place in the consideration of the profession in the last few years as that of corporation law, nor is there a question of greater importance to the material interests of the State of Virginia. I believe that it is now generally recognized and admitted that the time has arrived for the State to revise its policy towards corporations. The mode, extent and character of this revision present questions of the utmost importance and gravest moment for the consideration of statesmen and politico-economists.

It is with great diffidence that I enter upon this subject, as neither the time at my disposal nor my information are sufficient for a proper discussion of the question. But I feel that any suggestions looking towards reform may be of value in interesting those more capable in the work which is to be done at an early day.

A high state of civilization demands the aid of corporations to work out its destiny. Rome and Greece found them necessary, and they are necessary in this enlightened age. There can be no question that the enormous strides in material prosperity made by this country in the last few years could not have been made without their aid. The advantages and disadvantages attendant upon them are obvious. Co-operation is an advantage; want of individual responsibility a disadvantage. Their tendency is to drive labor into aggregations. On the other hand, the laborer employed by corporations, as a rule, gets better wages, steadier work and fewer hours than the laborer employed by individuals.

If we consider the popular complaints about corporations, with the way in which they are popularly formulated, they will be found to be in substance—

First. Excessive capitalization and stock-watering of the carrying corporations.

Second. Insecurity in the basis of credits, of mercantile or trading, mining and manufacturing corporations; and

Third. General irresponsibility of all corporations to the law which controls natural persons.

The reasons for the first of these popular objections are so apparent and the remedy is so obvious that I need not detain you in the discussion of it.

The other two I will allude to briefly as presented under the laws of the State of Virginia.

A corporation may be created by the circuit court for any purpose for which a partnership may be formed and to do anything that an individual can do—in fact, to do anything except the building of a railroad, or canal, or turnpike beyond the limits of the county, or the creating of a bank of circulation. The capital stock may be as many millions of dollars as the incorporators may elect; it can hold as many acres of land as it chooses—one acre or a million; residents or non-residents, aliens or citizens may be directors and officers; the principal place of business and directors' and stockholders' meetings may be in or out of the State. There is no liability upon the directors or stockholders except on unpaid subscriptions; no public reports are required; they may organize and do business without one cent of money actually paid in on the stock; and a company thus organized, with irresponsible stockholders, may subscribe to and hold the stock of another corporation.

This statement would seem enough to convince the most credulous that a very radical reform should be made in our corporation laws.

Formerly, the Legislature alone granted charters. This system was obnoxious as class legislation and the present laws were substituted in their stead. If our laws are made as the laws of many other States are—rigorous and thorough—we will, of course, have to meet the evil of foreign corporations doing business in our State to an extent that is unknown at present. The evils attendant upon these tramp corporations can, however, be minimized by requiring them to become, to all intents and purposes, domestic corporations. This has been done in a number of States for self-protection, and it is believed that the comity existing between the States will gradually do away with the loose laws that now exist in this State and others.

To use the words of a recent writer:

"The practice of chartering irresponsible and ungoverned corporations to prey upon the people of other States is immoral in itself. It makes the State an accessory before the fact to whatever villainy may be perpetrated under the sanction of its seal. It is unjust to our sister States."

The State of Virginia is now open to this reproach. These tramp corporations should be held a fraud upon the domestic law relating to the formation of corporations, and they should be held to the law of partners, or unincorporated persons; but, unfortunately, the trend of decision seems to be the other way. (*Demarest* v. *Flack*, 128 New York, 205.)

While too great an interference with corporations is to be deprecated, yet there can be no gainsaying the proposition that when the State has created an artificial person with a limited liability, it should see that the capital claimed is actually paid in, and that the disposition of this capital is made public. Creditors and those dealing with it can surely demand as much from the State in regard to its creatures. In addition, good policy demands it. The great curse to the business of this State in the last few years has been mainly this class of corporations. If the stock had been required to be paid in advance, only those who could have afforded it would have gone into the companies, and the companies organized, which would have been very few in comparison, would have had abundant capital for their business, and would have been a real benefit instead of a curse to the State.

In my section of the State the dockets are crowded with cases against subscribers to the stock of corporations. A few years ago numberless corporations were chartered; no payment on stock, or a very small one, was required, and as a result men who were utterly unable to afford it subscribed for thousands of dollars of stock, anticipating early returns, and that they would have no further payments to make. The companies contracted large debts; made unremunerative investments, and in many instances were mismanaged and became practically bankrupt. Now the stockholders are required to pay for their stock, which is tantamount to the ruin of most of them. These men would never have subscribed if the whole of the capital stock had been required at the time of organization.

The laws of this State are thus, in a large measure, directly responsible for the ruin of many of its citizens.

Another fruitful source of fraud and ground for the charge of irresponsibility is the statute dwelt upon by Mr. Kean in his address as President of this Association. I allude to the statute allowing one corporation to subscribe to the stock of another. The evils attendant upon this statute were so ably discussed by our President that it is unnecessary for me to dwell upon that point.

Another evil of our laws are pocket corporations—corporations owned absolutely by one man, with a few figure-head associates. It is simply a shield to avoid individual responsibility. The law was formerly that one man could only hold a certain amount of stock, but even this safeguard has been removed, and at present individuals all over the State are doing business under the name of some company organized and running as a regular corporation, protected by the laws of this State and given limited liability.

There are some corporations beneficial in the extreme, developing the State, giving employment to labor and a market for the supplies of the neighborhood; while others are simply shields behind which individuals do acts which they would not dare do otherwise, and escape individual responsibility.

The greatest cure for these evils and the other evils which are obvious from reading our statute, is publicity—the filing of a certificate showing the stock as paid up in full, the character of the business, the officers, the amount of stock owned by each incorporator, and after that periodical reports—of course, also abolishing the law alluded to by Mr. Kean and fixing the maximum stock to be held by each stockholder.

I do not advocate the legislating of corporations out of existence, or the imposition of improper and onerous burdens, because such a course would be disastrous to the best interests of the State; but I do advocate laws that will glean the good from the bad; that will protect the workman and the creditor, and that will remove the temptation to gamble that our laws now offer. Such amended laws will not retard, but promote improvement; they will not prevent good solvent com-

panies from operating in the State; but will exclude the lame, the halt, the maimed and the blind that have already been a curse to the State, and bid fair to be a greater burden. Publicity is one of the best restraints of corporations and the best protection of the public. It prevents the accumulation of enormous profits by checking industrial monopolies and inviting competition; it prevents fraud upon the subscriber to the stock and on the creditors. The publication of its business would prevent the watering of stock, the selling of stock above its value and the getting of undeserved credit.

As I understand it, other States have passed laws for their self-protection. New York requires every corporation incorporated under the Manufacturing Act to file a certificate showing that its capital stock has been paid up in full. The State of Pennsylvania has adopted very stringent laws for the government of its corporations. They are subject to rigorous censorship when organized; charters are not granted unless a large part of the capital stock has not only been subscribed but paid in, and imposing a considerable tax for the privileges granted. Ohio imposes a double liability on stockholders for the debts of the corporation, and under the new Constitution of Mississippi foreign corporations doing business in that State are compelled to be domesticated, and they are denied all privileges unless they are so domesticated.

These are simply samples of the laws which are being passed all over the country to do away with the evils I have mentioned.

Corporations at present are practically irresponsible. There is no adequate machinery provided for punishing them for dereliction of duty. There should be a statute passed in regard to their dissolution and winding up, especially when they become insolvent, or when they are in any way guilty of infringing the laws of the State.

While not desiring to criticise our code, I must say that it is not full enough upon the subject of corporation law, nor is it explicit enough. The common law, which is the ground-work of our law, is the law of an agricultural people; so far as lands and the rights relating thereto are concerned, it was highly refined; but although very flexible, it is not altogether applicable to the complex condition of things now existing. In old times large

corporations of the joint-stock-company kind, organized to carry on business requiring a large capital, were almost unknown. New inventions, the telegraph, the telephone, electric cars, &c., continually give rise to questions as to the application of the laws. Out of the effort to apply old principles to new facts by the different State courts and also the Federal courts—all of whose decisions are reported—the law has become uncertain, the decisions conflicting, and it is almost impossible to reconcile them. As a consequence, lawyers hardly know how to advise their clients and cannot be certain at any time that they have advised them correctly. These evils should be corrected by legislation. The law in regard to corporations should be made more full, explicit and accurate.

"Complete uncertainty in law differs little from the absence of all law."

Any lawyer in the last few years who has tried to evolve any correct set of principles from the numerous decisions will agree with me that we are in a condition of almost complete uncertainty at this present time.

The experience of the State in the last few years shows that we must treat these necessary monopolies as functions of the State, while, as far as possible, their freedom and liberty of trade must not be interfered with; yet the creditor and the community must be protected. The present laws favor an unhealthy spirit of business. The gambler's lust for gold becomes the general characteristic of the people; the old, honest, safe and respectable methods of acquiring a competency are too slow and plodding, and under the influences of these creatures of the law the feverish passion for riches has seized thousands who have neither the ability or the means to indulge their passion for speculation. The result of the after crash in this State has been to lower the people's ideal of honesty and blunt their sense of justice.

The next subject to which I desire to call your attention is one which to my mind is of very great importance. I allude to the trial of civil cases by juries.

The present system of jury trials was adopted under a different civilization, different environment and condition of society—when juries were not only judges, but witnesses. It has now

become onerous and cumbersome, often defeats justice, and nearly always delays it. It is onerous to the State and to the juror. The ideal juror is a man of the description contemplated by our forefathers when the jury system was first inaugurated—that is, a man of the vicinage, interested in the welfare and the well-being of the community, engaged in work that will benefit himself, his family and the State; in other words, respectable, intelligent business men and farmers. Such a man's service on the jury for a week, or, as is often the case, for several weeks, is a very serious burden; his affairs have to be neglected; his business suffers, and his compensation of fifty cents a day does not pay his actual expenses. As a result, exemptions from jury service are more numerous than wise, and these exemptions are of very little avail to the class that suffers the most. I refer to the farmers. The exemptions in a large measure do not apply to this class of our citizens, but to the business men and residents in cities, who, as a rule, have clerks, partners and associates who can, in a measure, fill their places. The farmer has no clerk to leave in charge of his stock, to take care of his sheep, to gather his crops. As a rule, he is the least interested of any man in the community in the court—seldom, if ever, having a case; paying a large part of the taxes, yet required to serve on juries in the litigation of matters that can be of no earthly interest to him, at the expense of his individual time and attention, and further, as a burden to him as a tax-payer. It is onerous to the State, or rather to the counties and cities of the State, because the expense is enormous. In the county of Roanoke, for the year ending at the July term, 1893, the grand juries cost $99.08, the juries in criminal cases cost $549.08, while the juries for the trial of civil cases tried in the circuit and county courts cost the enormous sum of $1,304.36. In the city of Roanoke the grand juries for the year ending July, 1893, cost $195, juries in criminal cases $1,600, while the juries in civil cases in the hustings and circuit courts cost the large amount of $1,888.04. In one case in Salem between a land company and a citizen of the town of Salem the jury has cost already $157.60. There was a mistrial and the case will have to be tried again, and, perhaps, two or three times, and very likely with increased expense each time. In another case between a citizen of Salem

and a railroad company the jury cost $296.08. The case was decided in favor of the company. In other words, for the trial of these two cases the county of Roanoke paid the sum of $453.68, which has come out of the pockets of the farmers and tax-payers of the county—with nó decision in one case and no recovery in the other. I have had no opportunity to examine the records of other counties. I took the city and county of Roanoke as two fair examples, except that the criminal costs in Roanoke are larger than those of any city in the State in proportion to its size. It is manifest that the expense of criminal trials in the State, about which there is a tremendous amount of interest taken, is not of so much importance as a reformation of civil jury trials. These amounts only represent the amount paid in money from the tax-payers, but they do not represent an equal or very much greater drain on the community in the time occupied by that great number of jurors who are kept from their business and from being producers. I believe that an investigation will show that over $250,000 is paid out by the cities and counties of the State for civil juries.

The question that naturally presents itself to the mind of the intelligent man in contemplating these facts is, Does the good of this system counterbalance its evils? The law's delays from the earliest time have been the reproach and shame of our profession. In Magna Charta it is classed with the denial and the selling of justice; yet we find at this late day, when every other science is making enormous strides towards improvement, the delays are almost as great, if not absolutely as great as they were a hundred years ago. Our jury system is, in a large measure, responsible for this state of affairs. A trial before a jury is always more protracted in length than before a judge—mistrials are frequent.

The delays incident to jury service are numerous. I am aware of the veneration, and the just veneration, of our profession and the people of our race for the jury; it has been the bulwark and fortress of our freedom; the protection of the weak against the encroachments and tyranny of the mighty, and I would be the last man to advocate the abolishment of trial by jury in criminal cases, and even in civil cases with reasonable and proper qualifications and restrictions; but it does seem to me that the size

of the jury and the unanimity of its decisions are not vital matters in this age and time. The jury came to us as it is and we are not responsible for its faults. "Long ago Sir Edward Coke declared that it was no trespass for a man to be the heir of his father." On the other hand, we are responsible if we do not reform where the spirit and needs of the present age demand reformation, and if we transmit to our heirs a system which has been shown by trial to be inadequate, burdensome, expensive, and subversive of justice.

In a public address recently delivered the following language was used:

"There are two points from which jurisprudence is generally regarded; one, that from within, as she appears to the priests of the sacred temple of justice who venerate her most trivial rights and guard her mysteries from the profane. That is the professional aspect of the science. The reverse of the picture is the appearance she presents to the unwilling votaries who are forced to do homage at her shrine, to whom she seems arrayed in motley robes, addressed in an unintelligible jargon, issuing incoherent mandates and making little but a lottery of strife."

I am not prepared to subscribe to the above in its entirety, but there is much truth in it, as is shown by the efforts of boards of trade and other commercial bodies to establish boards of arbitration and referees for the settlement of cases without risking the delays of the law and its uncertainties—uncertainty and delay being equally injurious to the man of business. Modern thought and modern reason are all against the retention of twelve men on the jury and against the demand for an unanimous verdict. This is shown by the acts of individuals, States and countries. In Pennsylvania and New Hampshire, and to some extent in England, trial before judges and referees has been substituted for trial by jury in a large measure. In New Hampshire this has been attended with the most gratifying results. The reference is made by consent, as I understand the law. Prior to 1874 their dockets were crowded. Leading counsel were engaged in the trial of most every important case before juries; the courts would last until litigants, judges, jurors and lawyers were worried and wearied out, and adjourned with the docket still full.

This grievance was so great that cases were referred after the act was passed in great numbers. Even cases for tort were referred to these referees, and the result was that, while in the year 1876–'7 there were 215 jury trials, in the year 1882–'3 there were but seventy-five. Courts as a rule appointed but one referee; in comparatively few cases two were appointed, and in some cases of exceptional importance three were appointed. The practice in England under the Judicature Act is to have reference to a referee where there have been two, and even sometimes where there is one mistrial, on account of the disagreement of the jury. This is done in all cases, including action for damages in tort. The Pennsylvania practice is similar to that of New Hampshire, as I understand it. In all of the large cities of this country there are regular arbitration boards for the settling of disputes of business men, while there is scarcely any trade association in London, or the largest cities of England, which has not an arbitration committee. It is reported that these committees have done incalculable good in settling disputes between members economically and expeditiously; they have proved so serviceable that a new chamber of arbitration has been established for the benefit of all who might need its services in the city of London. It is of a public character and situated in the Guild Hall; it is available both for voluntary and judicial reference; it has an elaborate and complete system of rules and regulations, and all arbitrations are held before one, two or three arbitrators, as the parties may desire.

It will be seen, therefore, that the legislatures of at least two States have rebelled against our jury system and substituted in a large measure referees instead. England has done the same, and all over the country the business men, who are the persons of all others most interested in having juries, because they occupy the larger portion of the time of the courts, have adopted juries of their own creation, consisting of not more than three men.

It will be seen further by an examination of our statutes that in proceedings in eminent domain, in the condemnation of property, where the sovereignty of the State is asserted in its highest form, that only five commissioners are selected and all of them need not act. By reference to the Encyclopædia of Law, under

the head of juries, it will be seen that a large number of States have made modifications in the old common law rules. I therefore ask in all candor why should the counties and the cities in this State be put to the enormous expense that they now incur, and their citizens to the enormous amount of inconvenience and loss which they now suffer, to preserve a mode of trial that has been abandoned by many of the States, and by England, and has been absolutely repudiated by the business bodies all over the country.

If the jury was reduced to five or three men, the burden of serving on juries would be greatly lessened. Capable men would not refuse to serve, because their turn would come less often, and surely five good jurors will come as near getting to the truth and justice of a case as twelve. In my opinion more so, because it is more likely that five good jurors can be picked than twelve good jurors. It is to our interest, not only as citizens of Virginia and tax-payers, to advocate this change, but it is to our interest as lawyers. The delays, uncertainties, the costs of jury trial, are driving the people to arbitration, to a settlement of their affairs out of court, until office practice has become in the cities more remunerative than court practice. The practice of the law suffers from our own failure to advocate reform ; interest as well as patriotism demands that we should make changes that are necessary. The dockets are crowded in my section. It is impossible almost to clear them on account of the number of protracted jury trials. The trial of one of these cases is a practical denial of justice to other litigants.

Mr. Justice Brown, in an address before the Ohio Bar Association in July, 1892, said :

"I can hardly imagine the Legislature of Ohio refusing to act upon the unanimous recommendation of this association, or passing a law which it shall adjudge to be ill-timed or unnecessary."

Whether or not we will have the same good fortune is questionable, but I believe that our duty is plain in this matter, and that is, to urge change whether we get it or not, if we believe it conducive of the general good. There is not a lawyer in my hearing who would ask for more than three men in a case of arbitration. There is not a business man or farmer who pro-

poses to arbitrate any question connected with his business affairs who would think of demanding more than three arbitrators. Why, therefore, in the name of all that is sensible, should the State be required to provide twelve arbitrators for the consideration of a similar case. It is questionable whether the State does not pay out every year almost as much to juries as changes hands as a result of jury trials. If we count the actual value of the time of the jurors in addition to the money paid, I have no doubt of the fact. It is an absurd generosity on the part of the State. I believe that if the law was changed so that the ordinary jury should consist of five, or three, with a provision that any litigant could demand, if he saw fit, a jury of twelve, provided he would pay the additional expense, there would not be a jury of twelve men demanded in the course of a year throughout the whole State of Virginia, for the same reason that twelve men are not now considered necessary to arbitrate questions that are often vastly of more importance than four-fifths of the cases tried in the courts for which juries are provided. I speak earnestly about this matter, because I believe that the State is too poor, the people have to work too hard for their money to waste it in taxes for the maintenance of an inadequate, useless and absurd system which has been repudiated by every business organization throughout the world.

The next subject to which I wish to call your attention is the usury laws of the State of Virginia.

The revisors of the Code of 1849 in a note use the following language:

"We recommend another rule as better sustained by the enlightened opinion of modern times; more equitable, better calculated to diminish litigation and conducing more to the welfare of the State."

The rule recommended was that the legal interest should be six per cent.; but by a written contract, or assurance, eight per cent. could be charged. The recommendation of the revisors of the Code was, for some reason not apparent at this time, disregarded. It is questionable whether their recommendation should not be renewed and be adopted by the Legislature. The politico-economists agree that a contracted currency produces depression in

business and what is known as "hard times." Statisticians have calculated that the per capita circulation of the South, and a greater part of the West, is from six to eight dollars. The per capita circulation should be four or five times this amount for a healthy business condition. As long as the present conditions obtain, we will suffer from stagnated business, due to the want of circulating medium. In times of great confidence the circulating medium is aided by negotiable notes and evidences of debt. In times when want of confidence prevails these cease to be of use for this purpose, and the scarcity of actual currency is felt. It follows as a logical conclusion, if I am correct in my premises, that legislation should be directed to the bringing of currency into the State, and I do not believe that any one piece of legislation would have so good an effect in this direction as the adoption of the recommendation of the revisors of the Code of 1849.

The tendency of our present usury laws is to create a monopoly in the business of loaning money—to confine it to a few bankers and money-lenders—to cut off the State from the money markets of the world. Monopolies are necessarily injurious—competition beneficial. The bankers and money-lenders of this State who sell their money, sell it for the profit that is in the business, as a rule; get as high a price as the market will afford—exactly as the merchant sells his goods at as high a price as the market will stand. The banker and the money-lender here know that, on account of an educated public sentiment, and the fear of the consequences, not one man in a thousand will plead usury. The result is that the usury laws of the State are practically a dead letter, so far as the loaning of money by banks and money-lenders of this State is concerned.

The number of those who deal in money is necessarily limited, because the capital available for such purposes in this State is limited. The result is that it is difficult to borrow money even at usurious rates, and impossible, as a rule, to get it without usury, unless it is borrowed from some one loaning in a fiduciary capacity. Another result is that money is loaned for short terms to avoid the danger of death and the compulsory pleading of the usury law by the personal representative. As a consequence the farmer, the business man, or in fact any one who may wish to

borrow money for a considerable period of time, can scarcely get it at all. The farm cannot be improved, the business increased, the manufactories enlarged on money borrowed for sixty or ninety days. The cost of it is much greater in the first place, and the uncertainty as to the renewal of the loan, in the second place, makes short-time money practically unavailable for these purposes.

Money in this State is always worth more than 6 per cent. No one who has it to loan is going to loan it for a long period when he can loan it for a short period at 8 per cent. or higher. The result is that our farmers who would like to improve their stock, to build barns, silos and in other ways make their property more productive and valuable; our merchants, who would like to increase their business; our manufacturers, who would like to add to their plants when profitable, are precluded absolutely from doing so from the impossibility of getting the necessary money. Any of these classes can afford to borrow small amounts o money at 8 per cent. to enable them to make improvements which will, as a rule, pay largely in excess of the interest. A farmer with a farm worth ten or twenty thousand dollars, by an outlay judiciously of $1,000, could make it a third more profitable. He could well afford to pay 8 per cent. for a year or two, or five years, to enable him to do this; but our laws say, no. I believe, if money could be borrowed at 8 per cent. legally, that it would result in the farms of the State being brought into a higher state of cultivation and productiveness and in the business of the State being more stable and removed further from the hand-to-mouth system, and in our manufacturing establishments being enlarged and giving more employment to labor, and necessarily a greater consumption of the products of the farm. I believe further that an enlarged market would create competition; capital would be turned in this direction—it would look towards Virginia for investments, and gradually, as a result of the influx of capital, competition would commence and money would be cheaper than it is to-day. There is no fear of loaning money in Virginia. Capital is not timid about the State—it simply does not come because it can be loaned at higher prices elsewhere.

It is true that it cannot be loaned at higher prices in New York, or Philadelphia, or Baltimore, or, in other words, at the home of

capital, but away from home it demands a greater per cent. than six. The building and loan associations are an example of this. The building and loan associations of the North have no hesitancy in loaning their money in Virginia. The reason is, that under their rules a greater per cent. than six is paid and capital comes here, where it is productive. But whether money becomes cheaper than what is charged for it now or not, it will certainly become more plentiful; it will certainly be available on long time loans, and if this is accomplished the State will receive enormous benefits. Is there any just reason why the farmer or the business man who needs a few thousand dollars for three or four years, who cannot get it within the limits of the State, but can get it outside if he is allowed to pay for it the usual market rate, should not be allowed to pay it? Is not the law a restriction on business, a restriction upon the liberties of the people? Does not experience, of which we are familiar, show that money cannot be borrowed out of the State for six per cent.? And our law simply limits the market, or rather closes the money markets to our people, preventing the larger number from borrowing at all without benefiting those that do succeed in borrowing, as to the rate of interest. The law not only makes money dear but scarce. The difficulty with the outside capitalist is that he does not know our people. He does not know that they will not plead usury, as our home bankers and money-lenders do, and, consequently, he will not loan his money here contrary to law, nor will he take the risk of usury being pleaded, when he can get eight or ten per cent. interest elsewhere without breaking the law.

As far as I can see, after a very considerable consideration of this matter, the only persons benefited by the present laws are the bankers and money-lenders. They pay absolutely no attention to the law and get as high a rate of interest as they may choose to charge. By some hocus pocus the minds of men have been warped into believing that the law in some way controls the bankers and money-lenders when they, themselves, if they go to the bank to borrow money, see the absolute worthlessness of the statute. I had a capitalist from Massachusetts to tell me that his family and himself had loaned thousands of dollars in the West, but on account of the distance they would much prefer loaning in

Virginia, and would be perfectly willing to do so if they could get seven and one-half per cent. clear of all expenses.

A farmer might be very wise to borrow $1,000 to build a silo, get labor-saving machinery, prepare barns, drain his farm, improve his lands or enable him to change his farm from a grain to a grass or truck farm, and pay 8 per cent. for the money. The eighty dollars which he would pay a year would be returned to him many-fold in additional profits out of an improved and modernized farm. He may be able to do this now, but if he does, he will have to pay 8 per cent. for the money. Why not open the money markets of the world to him. Why not let him get this money at 7 or 7½ or 8 per cent. Only five or six States in the Union, according to an interest table which I have examined, deny the right to contract for a higher rate than 6 per cent. A large number of States allow by special contract 8 per cent.; two or three 7 per cent.; several 12 per cent.; one 24 per cent., and a number of them with no limit to the charge that can be made by special contract. In other words, with the exception of a few of the older States where capital is plentiful, the laws have been made, for the reasons pointed out by me, in accordance with the recommendation of the revisors of 1849. It is time "Old Virginia" should follow the example of her sisters. We cannot afford to make a monopoly of money—we want all that we can get—we want our waste places improved, our farms made productive, our minerals developed and our people prosperous. When all argument is in favor of the adoption of the recommendation of the revisors, and the experience and acts of other States are in favor of its adoption, it would seem a short-sighted policy for us to persist in retaining our usury laws. I know that there are many objections to higher rates of interest; I know that it will be urged by many that people cannot afford to pay more than 6 per cent. The answer to that is, in many cases money can be borrowed at an amount largely in excess of 6 per cent., and borrowed profitably; but the best reason is that the people have to pay more than 6 per cent. now; the market is contracted, and they should be the best judges of what they can afford to pay.

The tax question is the most complicated and difficult of all questions relating to the social compact called government.

Taxes concern all men; their happiness in a large measure is dependent upon the burden of their taxes. Every man is said to work one month in the year for the privilege of being governed. While taxes are the source of the nation's strength, they are too often the source of the citizen's weakness. The importance of the tax laws being equal, uniform and as little burdensome as possible, will be conceded by all. There has been more said upon the subject than any other relating to government. It is filled with difficulties. Which of the various systems advocated is correct, I will not undertake to say. I cannot undertake here to-night to propose any system; all that I can undertake to do is to point out some of the imperfections of our laws and to urge with all my might upon this Association the importance of a thorough, adequate and comprehensive revision of the tax laws of the State of Virginia.

To begin at the very beginning, the system of ascertaining the taxable value of property is radically wrong. There are two classes of property to tax—real and personal. The mode of ascertaining the value of real property in this State is by assessors elected in each county, their work reviewable only in the county court of the county, and practically only at the motion of the party whose property is being taxed, for I have never heard of the State moving for valuations to be increased. These assessors have no connection whatever with other assessors throughout the State. Each assessor's work is absolutely independent of every other assessor. There is no central board of equalization to see that the assessments are correct or equal throughout the State. The natural result of this system is that there is no uniformity whatever in the valuations. If any one will take the report of the Auditor of Public Accounts of the State of Virginia, he will be absolutely astounded at the difference of values in this State. Counties that he has heretofore believed to be of almost equal value are assessed at widely divergent figures. This is but natural. Taxes are high; the burden is heavy, and each assessor undertakes, as far as he can, to protect his own people. He hears or believes that the valuation in the neighboring county is less than it is in his own. Be he ever so honest, his mind will be biased towards putting his own constituents on the same level.

Further than that, all men are not honest. A dishonest assessor can assess the lands in his own district at an absurdly low figure. The people themselves will not complain, and in all human probability the Commonwealth will not complain. This is unfair to the State; it is unfair to the people; it is unfair to the counties. In other States a board of equalization goes over the assessments. It sees that the burdens are justly apportioned. It would see in this State that Loudoun, Roanoke, and a few other counties did not have an assessment out of all proportion to many other counties in the State. I have been told, whether correctly or not I do not know, that in one of the counties in the State there was a general lowering of valuations of land by the assessors—not that the lands had decreased in value, because they had not, but simply because the people of that county realized that they were paying more than their neighbors. This is a result that cannot be avoided. Personal property, except that of a visible and tangible description, is practically untaxed in this State. It is left to each individual to say what his personal property is worth. The temptation to under-value and escape taxes is greater than average human nature can resist, and as a result a large part of the personal property is not assessed at all, and that that is assessed is under-valued. In other words, there is a premium placed on perjury. The horses, the cattle, the plows, the sheep, the hogs, the wheat and the corn of the farmer are all visible and tangible. They may be under-valued in many cases; doubtless they are; it would be little less than miraculous if they were not. The farmer sees that all other personal property is under-valued or escapes taxation altogether, and he would be more than human if he did not try to protect himself; but they are actually assessed, while the stocks, the bonds and the evidences of debt held by capitalists locked up in strong boxes, escape taxation absolutely.

In fact, the evasion of taxation is time-honored in Virginia, and is supported by very high authority—the records of Fairfax showing that the Father of his Country was indicted twice at one term of the court for not entering his lands for taxation according to law, and indicted at another term for not giving in his "wheel carriages" for taxation.

There is not a man within the hearing of my voice who does not know of cases of this description. It is not just, it is not right, that that class, which is the bulwark and defence of the State—the producing class—the class that adds to the riches of the State and has fewest riches itself, should bear the bulk of the personal taxation, as at present. So long as the assessments of personal property are made as they are, this inequality will exist. There have been many plans suggested for the prevention of this—such as the appointment of assessors by an independent central power; the non-eligibility of assessors for re-election; the examination of reports by the grand jury, and the publication of the tax-list in order that people may be shamed into honesty. Whatever method is adopted, some method should be adopted, as something must be done for the protection of the classes with tangible, visible property, against those whose property is concealed and invisible.

Another matter that bears hard upon this State is double taxation. The Constitution of Virginia provides that taxation shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value. Let us see whether this is the case.

I will here quote from an article in the June, 1891, number of the *Virginia Law Journal:*

"A has a tract of land valued at $1,000, on which his taxes for all purposes at one dollar on the hundred amounts to $10. B has $500 which he has saved from his wages, and on this his taxes are $5, and for the $1,500 of property values the State fairly and constitutionally gets $15. B concludes to go to farming, so he lays out his $500 in implements, team, &c., and rents A's land. Their tax still remains the same, A paying $10 on the value of land and B $5 on the value of his team and implements. After awhile B sees his way to better farming if he owned the land and was free to make improvements on it. This is decidedly to the interest of the State, and a sound public policy should encourage and facilitate his doing so. B bargains with A for his land at $1,000, and having no money ahead gives him a deed of trust for $1,000 on the land and his team and implements, worth altogether $1,500, to secure him. The tax-gatherer comes around and collects of A

on the deed of trust as before $10; but of B he collects $15, and the State gets $25 out of this transaction, while before it got only $15. Now, the men possess no more property than before, no property or value has been created; sell them out and the joint assets are worth only the sum of $1,500, and yet the State levies and makes them pay $25, while before it only got $15."

The statement of this matter would seem to be sufficient to cause a change in the law. Our taxes are too heavy as they are. At the rate of $1.50, which prevails in a large number of places in this State, we will find the following result:

A owns a farm of the value of $20,000. Say he has an income of 6 per cent. from the farm. His taxes will be, at the rate of $1.50 on the farm, $300, on the surplus income—that is, $600—$9, making a total of $309. The percentage of tax for the taxable income is 51½ per cent., and the percentage tax of total income is 25¾ per cent. In other words, for the privilege of farming a place of the value of $20,000 in Virginia, a man has to pay 25¾ per cent. of his income. In this calculation the taxes on his personal property necessary for the proper work of the place are not included, and he is given an income of 6 per cent., which is an unusual one in farming. If the value of personal property necessary to properly farm a farm of the value of $20,000 was added and the income cut down to 3 or 4 per cent., which is a fair income, these days, for the farmer, the percentage of tax to the income would be very much larger.

Another burden very much complained of is the income tax, as it is often applied. For instance:

A young man working on a salary of $1,200 determines to build a home. The building of this home will have the effect of making him a better citizen and should be encouraged in every way possible. The State, however, taxes him first on his lot and on his house, and taxes him on the $600 which he is using absolutely to pay for that home. While this young fellow is doing what he can to improve the condition of his family and become a good citizen, his neighbor may be the owner of a thousand acres of mineral land which is simply taxed as wild mountain land because it has never been opened and its productive value has never been ascertained. The law is against public policy—it is against all

theories of good government, that men should be allowed to buy up the mineral lands in the State, or the coal lands, and hold them without paying practically any taxes, waiting for a rise in values.

If the farmer allowed his farm to lie idle he would not be allowed to say that the farm is producing nothing and he should not pay taxes upon it. He would be told that his farm would produce if he worked it, and is of value, and the tax should be fixed according to the productive value, and it should be the same in regard to the vast mineral lands throughout the State.

I am aware that such a tax would have to be imposed judiciously; that it could not be levied in a way to drive off investments and development, but I believe it could be levied in such a way as to force development.

Is there any other business that is conducted in the loose manner in which the State's business is? Is there any private individual that had the income from the clerks' offices and from the notaries public that would not make some provision by which the actual amount due by these could be ascertained? For instance, the traveling auditor. I know that the commissioner of revenue is supposed to generally supervise the clerk's office, but this is, at best, superficial and inadequate. There is no supervision whatever of the returns from notaries public; they can report a large or no amount to the State, no one is the wiser. A provision that no acknowledgment should be good unless a memorandum of it was entered in the clerk's office of the county, I believe, would be the means of placing thousands of dollars in the State treasury. The income tax has been abused and praised more than any other form of taxation. My own conclusions are that every established business is worth more than its tangible possessions would sell for, the excess being represented by the good will. Every professional man has a property in his clientage. There is only one feasible way of reaching this description of property, and that is the income tax. A license tax does not, because the lawyer or doctor with a practice reaching into the thousands pays no more license than the lawyer or doctor who barely provides bread for his family. There is no other way to gauge the taxable value of professional and salaried men, or so much of the wealth of men or business as comes from its good will, reputation, &c.

To be equitable, however, this income tax should not take account of the income that comes from property already taxed, or where the income is being invested in taxable property, as mentioned a few moments ago, in regard to the young man building a home. What Colbert called the "goose-plucking system" of taxation should be avoided; that is, to tax to such an extent and in such a way as will not absolutely, but as nearly as prudent, impoverish the victim, but will leave him in a position to stand further exactions.

The canons of Adam Smith were convenience, economy, certainty and equality. I do not believe that our tax laws come up to this test. I do not pretend, as I said in the beginning, to be able to formulate and complete a system of taxation. All I have attempted to do is to call the attention of this Association to the obvious and open faults of our system. The whole tax question should be referred to a commision. Not only the happiness of our people, their prosperity and their development depend upon the right solution of this difficult question, but the question of capital coming into the State is also dependent upon it. The first inquiry made by proposed immigrants is in regard to the tax laws. It will be found upon an examination of these laws that practically every subject, every description of property that a man possesses, is taxed; that every work that he is engaged in is taxed, and that in many instances it is doubly taxed. This statement is worse than the reality, because, on account of the under-valuation, on account of evasions and subterfuges, our own people are not burdened, as the laws would induce a stranger to believe; but the knowledge that there are such laws will prevent the incoming of capital, which is so much needed at this day and time.

While not wishing to be impertinent, it seems that this question is too broad and too important for any Legislature engaged in the active business of a legislative session to properly attend to; that a commission should be appointed who could go into a scientific investigation of the tax question, and who could make our system conform to the great modern requirements, and let all men pay equally according to the benefits received. Until this is done there will be dissatisfaction, and just dissatisfaction.

The next subject to which I wish to call your attention is our collection laws. These laws were passed as a kind of stay law at a time when the people were just emerging from a long, ruinous and bloody war, and were, perhaps, justified at the time of their passage on the ground of self-preservation. Their continuing, however, at this late day, is almost a matter of self-destruction. The difficulties in collecting are an immense injury to the business men of the State, and especially to the land-owning and farming classes. In the cities justice can be obtained with reasonable promptness, but in the country, with two, generally, and sometimes three or four courts in the year, the collection of a debt is, at best, a long, unsatisfactory and losing business. Lenders of money will not lend their money unless there is some assurance that they can recover their debts in a reasonable time. Under our law judgment has first to be obtained. If there is not enough personal property to satisfy the execution (and there is generally not enough) a chancery suit has to be brought, with all its delays, costs and expenses, with the result that, although the money is at last collected, the debtor has not only his principal and interest to pay, but the costs of a common law suit and the costs of a chancery suit, and, if his land and personal property are sold, all the costs of such sales—making a very large increase in his debt. It is, therefore, positively to his disadvantage. It is equally to the disadvantage of the creditor, because he is out of his money during the pendency of the suit, which will certainly be a year, and may be three or four years. Nor is the lawyer benefited.

In the first place, these known delays prevent suits being brought, destroying business; and in the second place, he is out of his fees an unconscionable time. In other words, neither the debtor, the creditor or the attorney are benefited under the present law, while the general prosperity of the State is injured, because the law destroys credit—money not being available in the country unless secured by a self-executed deed of trust. The courts should be more frequent; changes in the jury trials should be made on the lines suggested, or some other line; the county courts should have additional jurisdiction in civil matters and execution should be levied on land as well as personal property.

The destruction of credit, in the first place, is ruinous; the difference between credit and want of credit is the difference between prosperity and poverty.

The debtor is sued on a debt, judgment is obtained, his personal property is sold, making it impossible for him to properly cultivate his land. Another suit is then brought, with additional costs and fees, and his land is sold. Costs, fees, &c., make the time he gets of no value, as these, added to the interest, make a very large addition to the amount of the debt which was owed when the judgment was obtained—equal to such an enormous interest that no property on earth could yield profits sufficient to pay it.

I hope that these collection laws, which are really a great incubus on the prosperity of the State, will be amended; that our profession who understand the facts will make themselves missionaries to explain it to the people. The great bulk of them think the laws are made for their benefit. It is our business who know the facts to explain that it is not, but to their positive injury.

There are many other suggestions that I could make if I had the time, but I have made enough already to show you what I mean when I speak of the duty of the bar in regard to legislation. My object, as I stated in advance, is not to criticise, but simply to suggest, simply to bring to the minds of my brother-lawyers matters that they are as familiar with as I am, and in bringing them to their attention, remind them of their duty to the State and to themselves.

These examples of needed change are not intended to be exhaustive, nor am I egotist enough to assume that the remedies suggested are the best. My object will be accomplished if I awaken your minds to the fact that there is a duty and the duty is yours.

The study and practice of our profession tends to beget a reverence for the law as written—the reverence of a Mohammedan for the Koran; there is nothing written outside of it that is good, and nothing written in it that is not good. Our conservatism is the result of this mental tendency. Mr. Burke, in speaking of Mr. Greenville, says:

"He was bred to the law, which is, in my opinion, one of the first and noblest of human sciences, a science which does more to quicken and invigorate the understanding than all other kinds

of learning put together; but it is not apt, except in persons very happily born, to open and liberalize the mind precisely in the same proportion."

In this country, where the lawyer is not only the expounder of the law, but the maker of the law, this tendency is particularly unfortunate. This is not the age for "quaint pedantry and scholastic riddles." Antiquarian research is very interesting, but the people want laws that fulfill modern needs and conditions. Our fault is not so much in the making of bad laws as in acquiescence and indifference; want of action, disinclination to disturb what is from the fear of what might be.

To use the language of a distinguished lawyer, our "training has been like that of the Flathead Indians; it has compressed our brain with common law bandages, even to the extent that the eyes of the mind have become inverted and look only backward."

There are said to be now at least 6,000 volumes of law reports, averaging 700 pages each, making 4,200,000 pages of decisions. Reading 50 pages a day, 230 years would be consumed in reading the decisions to date. Sixteen thousand cases are being decided each year, so that when the first 230 years of reading have been completed, there would be another equally large accumulation. An industrious legal Methuselah, reading and knowing the contents of this immense mass of reports, need still not know the law, for he would find almost every question decided in more ways than one. Often the same court decides the same question in several different ways. Surely "confusion now hath made its masterpiece."

The certainty of the law is the value of the law. In many of the departments this certainty can only be had by legislation. I am aware that many share the opinion of Anacharsis, who, when he heard of Solon's work in writing the law, said that "written laws in all respects resembled spiders' webs, and would, like them, only entangle and hold the poor and weak, while the rich and powerful easily broke them." But surely a written law, approaching certainty, is better than a law which does not even pretend to certainty. If the rule adopted by the Athenians, according to Plutarch, was applied to our law-makers, it is very likely that, while absolute perfection would not be reached, it

would be approached. Plutarch says that "under the constitution of Athens, after a law was voted and passed in the assembly of the people, the proposer of the law might be cited in an ordinary civil court, tried and brought to punishment if the court was of the opinion that the law was prejudicial to the public."

There has never been a period in the world's history when legislation in behalf of certainty was more needed. The business of a great mercantile people is dependent in large measure for its prosperity upon protection of the law—upon the law being plain and uniform—upon their being able to contract with reference to laws understood by both parties. The Emperor Caligula has received, and justly received, the censure of mankind for requiring the Roman people to obey laws written in such small characters and placed so high upon pillars that they were illegible. We, in the latter part of this nineteenth century, are as uncertain and ignorant of the law in many of its departments as were the Roman people under Caligula. This condition of affairs will continue "until a second Omar shall rise up, in the order of Providence, to burn our books, or the courts shall agree a little more generally," or order be brought out of chaos by legislation.

The improbability of either of the first two means of relief is so great that, in my opinion, we will have to depend upon the third. As a matter of fact, the confusion of the law cannot be remedied by the courts. They are bound hand and foot by precedent. Different courts may and do easily find and follow different sets of precedents; reason has very little weight against decided cases—a decision or line of decisions is followed whether there be reason for it or not.

A quotation from a decision of the New York Court of Appeals will be instructive here. In the case of *Bertles* v. *Nunan*, 92 N. Y., 165, that court says:

"It is said that the reason upon which the common law rule under consideration was based has ceased to exist, and hence that the rule should be held to disappear. It is impossible now to determine how the rule in the remote past obtained a footing, or upon what reason it was based, and hence it is impossible now to say that the reason, whatever it was, has entirely ceased to exist. There are many rules appertaining to the ownership of real property originating in the feudal ages, for the existence of which the

reason does not now exist or is not discernible, and yet on that account courts are not authorized to disregard them."

In other words, says this nineteenth century court, laws that were created to meet the wants and necessities of a past age and a different civilization have to be maintained as the law of conduct for the people of New York, although the reason of the law, if there ever was a reason, has been lost in the misty past. Surely Lord Coke spoke advisedly when he told King James that the reason of the law is not "natural reason."

I am not one of those who believe that the lawyer has no need of a knowlege of the history of the law, of its condition and progress in its different periods; but I do believe that there is too much mediævalism in the law; that it is weighted down by antiquity; that we are accustomed to live too much in a different age from our own; to mould our actions in accordance with the views of a different century; to look backwards instead of forwards.

I am aware that these very blemishes are considered by our lay friends as retained for the benefit of our profession—that its very uncertainty is believed to be for our profit. That this is an injustice we all know; but the only way of disabusing men's minds of this opinion is by taking a leading part in the work of improvement. The belief that lawyers, as a class, are interested in keeping the law ambiguous, uncertain, and costly is on a plane with the other belief, that moral obliquity and moral callousness are a necessary result of our training—there being many people in accord with the Germans who conquered Rome in their opinion about laws and lawyers. One of these barbarians, we are told, after the effectual precaution of cutting out the tongue of an advocate and sewing up his mouth, observed with much satisfaction that the viper could no longer hiss.

One belief is as false as the other, but they are due to different causes. One is due to the inability of the average man to disassociate the lawyer and client; the other is due in a large measure to our failure to perform our duty.

The great lawyer and philosopher, Sir Thomas Moore, in describing a perfect Commonwealth in his Utopia, says:

"They have few laws, and such is their constitution that they need not many; they very much condemn other nations whose

laws, together with the commentaries on them, swell up to so many volumes, for they think it an unreasonable thing to oblige men to obey a body of laws that are both of such a bulk and so dark as not to be read or understood by every one of the subjects."

How far we are from this condition I have tried in a measure to point out.

A lawyer in a recent address stated this fact:

"The law of bills of exchange, promissory notes and checks has been codified in England, with a codified statute containing one hundred sections, and, according to a statement of its author, it embodies two thousand English decisions and seventeen previous statutes, and reduces the law to about 1-5000 part of its former bulk."

This is a fair example of what may be done in many of the departments of the law. The law is at present looked upon, and in the main justly, as a piece of intricate machinery, contrived for the express purpose of being unintelligible to the masses and for the benefit of the lawyers.

The lawyer's duty to his profession and the community is second only, if second, to his duty to his clients. Our duty in the premises is plain; as far as possible, to discard uncertain, pernicious and antiquated matter incorporated in our laws and reports, and substitute wise, modern, certain and unambiguous laws. Absolute perfection cannot be had; absolute certainty pertains only to death and taxation; but we should have as nearly a perfect and certain set of laws as the wisdom of man can devise. The reproach that we have not should not remain upon a great and noble profession. The collection and arrangement of established legal principles in a concise and logical form, relieved of uncertainties, and the ambiguity and absurdity that has crept into the law, is work for lawyers, and lawyers alone. Behind us are the mighty examples in State craft, achieved by great Virginia lawyers—the Declaration of Independence, the Bill of Rights, the law of descents, and the other great statutes known to every lawyer. Before us lies a work equal in magnitude and as rich in rewards and laurels. Our duty is plain; the reward is sure in the State's prosperity, in a satisfied people, and in the consciousness of work well done.

PAPER

READ BY

ALFRED P. THOM.

THE INEVITABLE READJUSTMENT OF LAW.

Since the independence of the colonies two great revolutions have swept over this country. One when the league between the States was converted into a "more perfect union"; the other, when the divergent constructions placed upon the Constitution culminated in civil war.

The first was a peaceful revolution. Champions of contending theories sought by intellectual methods for the truth. They filled their slings, not with stones, but with arguments drawn from eternal principles. They won their victories in the forum of debate, and from their efforts sprung the Constitution of the Union with its first twelve amendments—a system of government which gives assurance to all the nations that civil liberty will endure forever.

But it was not destined that the peace which marked the birth of the Union should always distinguish its history. The two divergent views which had met in debate over the adoption of the Constitution quickly manifested themselves upon the question of its construction. The one side asserted that the Union was still a league among the States, but with greater concessions of power to the General Government than existed under the confederation, and claimed for each State the sovereign right to break the Union at will and to renounce its obligations.

The other side proclaimed that by the adoption of the Constitution the United States became a nation—a nation with delegated and limited powers, but still a nation, from which no State could

voluntarily and without the assent of the others withdraw, and that the Union was intended to be perpetual.

The differing intellectual convictions entertained by the adherents of either view were soon reinforced by material interests, and what were at first theories soon grew into conditions. Influenced by considerations of interest, the great question of constitutional construction became rapidly sectional, and was finally submitted to the arbitrament of war.

In that war the secession idea perished and the national idea was firmly established as the true theory of our government, at least for the future.

The effect of that decision has been universal. It has brought with it consequences operating upon the legal rights, the social relations and the ultimate destinies of our people. It has impressed itself upon the genius of our institutions. It has affected the fundamental relations between the States and the Union, and has necessitated modification in the principles applicable to these modified relations. This may be aptly termed

THE INEVITABLE READJUSTMENT OF LAW,

and it is to this subject that I propose, with your permission, to devote this paper.

My purpose is not to attempt its exhaustive treatment in the narrow limits which confine me. That task might well be the work of years and the results fill many volumes, but it is possible, even within the space that I may justly claim, to give something of an outline sketch, and to at least invite attention to this most attractive field of thought.

For more than twenty-five years the minds of statesmen and of jurists have been engaged in the effort to adjust our laws to our new conditions. Their work is not yet complete. At times they will have, perhaps, to retrace their steps; but the process of evolution has begun and has proceeded far enough for us to observe its direction, to measure completed results and to foresee, at least partially, its probable outcome.

It was inevitable that this evolution should find expression not only in constitutional and statutory changes, but also in the action of the courts.

It is not possible in the limits of a single paper, and not essential to the present purpose, to consider the statutory changes which have grown out of the triumphant establishment of the national idea. Some of these will, however, be incidentally mentioned in considering the pertinent decisions of the United States Supreme Court.

But the amendments to the Constitution have been fundamental—fundamental in its broadest sense—not merely expressing some incidental modification or enlargement of existing power, but creating new governmental functions and impressing radical changes upon the governmental system.

It was natural for the prevailing side to establish in enduring form the principles for which they fought. This they proceeded to do in three amendments to the Constitution, known as the thirteenth, fourteenth and fifteenth.

The thirteenth prohibited slavery and involuntary servitude, except as a punishment for crime.

The fourteenth created a citizenship of the United States separate and distinct from the citizenship of a State, and prohibited the States from making or enforcing any law abridging the privileges or immunities of citizens of the United States from depriving any person of life, liberty or property without due process of law, from denying to any person within their jurisdiction the equal protection of the law, and required that representatives should be apportioned among the several States according to their respective numbers, excluding Indians not taxed, and provided that this representation should be reduced in proportion to the number of male inhabitants of legal age and citizens of the United States denied the right of suffrage.

The fifteenth amendment declared that the right of citizens of the United States to vote should not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.

These amendments were adopted almost amid the passions of actual civil conflict and amid the exultation of victorious partisans. Notwithstanding the fact that all possibility of deliberate consideration was destroyed, the thirteenth amendment has the undivided support of a reunited people; the fourteenth is recog-

nized as the logical and necessary outcome of our changed conditions and is accepted as sound in principle and beyond the reach of successful disputation; but the fifteenth amendment is even now challenged from influential quarters and will in time receive a patriotic and statesmanlike re-examination.

On the other hand, the courts have not been, to the same extent, subjected to disturbing influences. Their judges have been clothed with the independence guaranteed to them by the Constitution. They have dwelt in an atmosphere where popular clamor need never reach, and it is in their constitutional decisions, evolved as they have been during a long series of years, that we can best trace the modifications of our system of government and discern the principles which are permanently to control our destinies. They deal not alone with constitutional and statutory provisions. It is their function to apprehend the great moral, social and material forces which operate permanently upon the people, and to announce in their decisions rules of conduct and principles of law adjusted to the sustained progress of civilization. In studying, then, the growth and influence of the national idea as indicated in the action of the courts, it must not be forgotten that we will find here, not merely the expression of principles triumphant in war, but a recognition of the philosophic basis on which they rest.

Steam and electricity have made of this a new world. New conditions have arisen which cannot be ignored, when a man can breakfast one morning in New York and the next in Chicago, and when gold deposited in the sub-treasury in Wall street may within an hour be utilized by the financial exchanges of San Francisco.

When time and space as elements in the transactions of men are practically annihilated, the agencies by which this is accomplished become great unifying forces in human affairs and practically irresistible in their tendency to establish closer social and political relationships.

The national idea, when subjected to these influences, is no longer the mere creature of triumphant physical force, but becomes the harmonious expression of the thought, the tendencies and the spirit of the age.

It was not only in the presence of a recently restored Union and under the influence of the impetus given to nationalizing tendencies by successful war, but in full recognition of the other great unifying forces which surrounded them, that the Supreme Court of the United States undertook the work of formulating the principles applicable to our changed conditions.

It will be remembered that among the amendments to the Constitution there was none declaring this to be an indissoluble Union.

The omission was doubtless based upon the idea that the Constitution already, properly construed, provided for a perpetual Union, and that to declare this now by express amendment would be to concede that it did not exist before, and, as a necessary consequence, that the war upon the seceding States was without constitutional justification. The impartial historian, however, will be called upon to chronicle the fact that this construction was not considered indisputable even by the leading statesmen of the victorious party. If it was logical to omit all amendment on this subject from the Federal Constitution, it would have been equally so to let the whole matter rest where the issues of war had put it. But this was not done. Virginia and other seceding States, while not perhaps expressly, were in effect required, as a condition of their full restoration to the privileges of the Union, to adopt a Constitution which, among other things, provided:

"That this State shall ever remain a member of the United States of America, and that the people thereof are part of the American nation, and that all attempts, from whatever source or upon whatever pretext, to dissolve said Union or to sever said nation ought to be resisted with the whole power of the State."

It thus happens that the seceding States have in their organic law a guarantee of perpetual Union, while other States have not. If that principle were already contained in the Constitution of the Union, there was no necessity for putting it in the Constitution of any of the States; if it were necessary to put it in the Constitution of any it should have been put in the Constitution of all, and the inquiry would, perhaps, possess some speculative and theoretical interest as to whether the fact that it is not a part of the organic law of some of the States places them

upon a different basis in respect to the perpetuity of their relations to the Union were it not for the case of *Texas* v. *White*, 74 U. S., 700, in which this fundamental question of constitutional construction was presented to and determined by the Supreme Court of the United States.

The State of Texas, after she had attempted to secede from the Union and the war had closed, instituted an original suit in the United States Supreme Court praying for an injunction against the defendants, being citizens of other States, to prevent them from collecting from the United States certain funds claimed to belong to the State of Texas. To secure jurisdiction that provision of the Federal Constitution was invoked which ordains that "the judicial power of the United States shall extend to controversies between a State and citizens of another State," and gives to the Supreme Court original jurisdiction in cases in which a State shall be a party. The question was thus presented whether Texas was a State of the Union. She had adopted the ordinance of secession and had fought against the Union. She had not been re-admitted.

The Supreme Court, in approaching the decision of the case, do so, even at that date (December, 1867), with a frank admission of the difficulty and delicacy of their task. "We are very sensible," they say, "of the magnitude and importance of this question, of the interest it excites, and of the difficulty, not to say impossibility, of so disposing of it as to satisfy the conflicting judgments of men equally enlightened, equally upright and equally patriotic." Their conclusion was that when Texas became one of the United States, she entered into an indissoluble relation, and that "considered as a transaction under the Constitution, the ordinance of secession, adopted by the Convention and ratified by a majority of the citizens of Texas, and all the acts of her Legislature intended to give effect to that ordinance were absolutely null," and that "if this were otherwise . . . . the war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation."

The reasoning upon which this decision rests will not be satisfactory to many perfectly candid legal minds, and as time goes

on the impartial jurist will prefer to consider the question settled by the successful issue of war rather than by incontrovertible constitutional interpretation.

But however this may have been in the past and on whatever basis the conclusion may rest, it is now a part of our fundamental and organic law, beyond the reach of dispute and secured by the universal acceptance of the people.

The triumphant establishment of this principle stands out as a mighty fact in our constitutional history. It has been taken as a premise in the decisions of the courts, and its consequences have been announced with logical and unwavering certainty.

Of course there could be no dispute about the existence of the powers expressed in the Constitution, but the question has been one of narrow or of liberal construction. The mighty influence of the principle of indissoluble unity may be discerned in connection with the deductions insisted on as properly drawn from conceded powers, or from the settlement of controversies involving the existence, scope or extent of other powers which may be denominated unexpressed, derivative or resulting, the most important of which is the power of self-preservation.

As affecting these I respecffully invite your attention to a few leading decisions of the Supreme Court of the United States.

The Constitution declares " that Congress shall have power to coin money and regulate the value thereof." In the case of *Veazie Bank* v. *Fenno*, 75 U. S. 533, this power was construed as broad enough to enable Congress to provide for the whole country a currency other than coin, and by a prohibitory tax on the circulation of State banks or other appropriate legislation, to secure to the people the benefit of the currency so provided, and to restrain the circulation as money of any notes not issued under its authority.

In the Legal Tender Cases, 79 U. S., 457, and in the Legal Tender Case, 110 U. S., 421, the power of Congress was asserted to make these notes of the United States a legal tender for the payment of private debts, incurred before as well as after the enactment of the law, to do so in peace as well as in war, to reissue notes which had been redeemed or received into the treasury and to give such reissued notes the legal tender quality, the court

holding that unless this were so the government would be without the means of self-preservation, and "that it is not indispensable to the existence of any power claimed for the Federal Government, that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers—that its existence might be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined, and that it is allowable to group together any number of them and infer from them all that the power claimed has been conferred—that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power"—"the powers thus exercised being those denominated by Judge Story, resulting powers, arising from the aggregate powers of the government."

It was on such general considerations as these that the power of Congress was upheld to make United States notes legal tender in payment of debts.

The power of self-preservation was again invoked in the case of *California* v. *Pacific Railroad Company*, 127 U. S., page 1. There the State of California had undertaken to tax the franchises conferred by Congress upon the Central Pacific Railroad Company. In declaring the tax invalid, the court says: "Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by a State. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? . . . . In view of the description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subjected to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCullough* v. *Maryland*, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United

States may be subjected to taxation by a State. The power conferred emanates from and is a portion of the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government and repugnant to its paramount sovereignty."

This case is but an affirmance in time of peace—in 1887—of the principle announced in 1862—in time of war—in the case of the *Bank of Commerce* v. *New York City*, 67 U. S., 631. Here the State of New York had undertaken to tax the stock of the United States belonging to the Bank of Commerce. The court holds "that the exercise of any authority by a State government trenching upon any of the powers granted to the General Government is, to the extent of the interference, an attempt to resume the grant in defiance of constitutional obligation, and more than this, if the encroachment or usurpation to any extent is admitted, the principle involved would carry the exercise of the authority of the State to an indefinite limit, even to the destruction of the power. For, as truly said by the Chief Justice (Marshall) in the case of *Weston* v. *The City of Charleston*, in respect to the taxing power of the State, "if the right to impose the tax exists, it is a right which, in its nature, acknowledges no limit; it may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe."

The Constitution gives to Congress the power to regulate commerce with foreign nations and among the several States.

Under this power the Supreme Court has held:

In the case of *State Freight Tax*, 82 U. S., 232, that a State tax upon freight transported from State to State amounts to a regulation of commerce among the States and is therefore void.

In case of the *Pensacola Telegraph Co.* v. *The Western Union Telegraph Co.*, 96 U. S., 1., that this power is not confined to the instrumentalities of commerce in use when the Constitution was adopted, but keeps pace with the progress of the country and adapts itself to the new developments of time and circumstance, and applies as well to the transmission of intelligence by the electric telegraph as to the hauling of freights by railroads and steam vessels.

In the case of the *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196, that interstate commerce includes persons as well as property, and when carried on by corporations is entitled to the same protection against State exactions that is given to such commerce when carried on by individuals; that the receiving and landing of passengers is a necessary incident to their transportation and a State tax thereon is void.

In the case of *Robbins* v. *Shelby County Taxing District*, 120 U. S., 489, known as the Drummer's Case, that a license tax imposed by the State of Tennessee upon drummers and others selling goods in said district by sample was unconstitutional so far as it applied to the sale of goods on behalf of individuals or firms doing business in another State, and that interstate commerce cannot be taxed at all by a State, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the State; and in *Asher* v. *Texas*, 128 U. S., 129, the questions arising in *Robbins* v. *Shelby Taxing District* were reconsidered and emphatically re-affirmed.

In the case of *Bowman* v. *Chicago Ry. Co.*, 125 U. S., 465, that a State cannot, under cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce, and that a State law passed without the consent of Congress, having for its purpose the protection of its people against the evils of intemperance, but amounting to a regulation of commerce, is unconstitutional and void.

In the case of *Leisy* v. *Hardin*, 135 U. S., 100, that sale by the importer in the original package is a necessary incident to interstate commerce, and the States cannot prohibit such sales without the consent of Congress, even in the case of intoxicating liquors, as the exercise of such power by them would be in effect a regulation of interstate commerce.

In the case of *California* v. *Pacific Ry. Co.*, 127 U. S., 1, affirmed in *Cherokee Nation* v. *Kansas Ry. Co.*, 135 U. S., 658, that Congress may, under the power to regulate commerce, construct, or authorize individuals to construct, railroads across the States as well as across the Territories of the United States; and

In *Bowman* v. *Chicago Ry. Co.*, and in many other cases, that where the subject matter of interstate commerce is national, or

one that requires a uniform rule, the failure of Congress to act upon it is equivalent to an expression of the national will that it shall be free from all restrictions and that the States have no power to pass laws concerning it.

The constitutional power granted to Congress to make or alter the regulations prescribed by the States as to the times, places and manner of holding elections for Senators and Representatives, except as to the place of choosing Senators, has been considered in a number of important cases.

The first of these was *ex parte* Siebold, 100 U. S., 371.

Here certain judges of election appointed under the State laws of Maryland were indicted in the United States Court for a violation of the enforcement act, which was approved May 31st, 1870, and entitled "An act to enforce the right of citizens of the United States to vote in the several States of this Union and for other purposes." Congress had not undertaken to make complete regulations for the conduct of the election of Representatives. It had not undertaken expressly to alter the regulations made by the States, but it had denounced a penalty against State officers for violating duties imposed by State laws in respect to such elections, and provided for the appointment of United States officers to supervise elections held by State officers under State laws, to preserve the peace and to see that the elections were legally and fairly conducted. The question was, Could this be done? It was held that when the State laws had reference to the election of Representatives in Congress the duties of the State judges were not only to the States but also to the United States, and that Congress had full power in the premises.

The line of argument adopted by the court to sustain its conclusions shows that the power contended for was based largely upon the inherent and fundamental power of self-preservation possessed by all governments. It says: "The greatest difficulty in coming to a just conclusion arises from mistaken notions with regard to the relations which subsist between the State and National governments. It seems to be often overlooked that a National Constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover is, or should be, as

dear to every American citizen as his State government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in a just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised towards this government in reference to the preservation of our liberty than is proper to be exercised towards the State governments. Its powers are limited in number and clearly defined; and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the National and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution. State rights and rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other. . . . . It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and teiritory of this country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle that the government of the United States may by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it."

And in *ex parte Yarbrough*, 110 U. S. 657, the court says: "That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the Legislature is elected by the people directly, has no power by appropriate laws

to secure this election from the influence of violence, of corruption and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration. If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the General Government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power, it is left helpless before the two great historical enemies of all republics, open violence and insidious corruption. The proposition that it has no such power is supported by the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises, the advocate of the power must be able to place his finger on the words which expressly grant it."

The doctrine of these cases was approved and extended in the case of *in re Coy*, 127 U. S., 731.

The inherent and fundamental power of self-preservation was again made the basis of action by the court in the cases of *Tennessee* v. *Davis*, 100 U. S. 257, and the *Neagle Case*, 135 U. S., 1.

Here the question arose as to the power of the United States Government to protect its officers in the performance of their official duties, and whether, when accused of crime against a State and the justification relied on is that the act was done under the authority of the United States or in the performance of official duty, that question can be passed on by the tribunals of the State or is under the exclusive jurisdiction of the courts of the United States. An officer of the United States is indicted for murder in a State court. He admits the killing, but claims that it was done in the performance of his official duty. Can the State court try that question? Jurisdiction to try means the power to determine, limit or construe away. It involves the power to punish, which in turn results in the power to prohibit. And if the State court can try the question, it possesses the power of destroying the sovereignty of the Union, for that government is no longer sovereign when the jurisdiction to control its agencies is in the hands of any tribunals other than its own.

In *Tennessee* v. *Davis*, the court says: "A more important question can hardly be imagined. Upon its answer may depend

the possibility of the General Government's preserving its own existence. As was said in *Martin* v. *Hunter*, 1 Wheat, 363, "'the General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers.' It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the General Government is powerless to interfere at once for their protection—if their protection must be left to the action of the State court—the operations of the General Government may at any time be arrested at the will of one of its members.

"The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National Government, and in obedience to its laws. The State court may administer not only the laws of the State, but equally Federal law in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution and the exercise of acknowledged Federal power is arrested. We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme."

And in the Neagle case, these views were carefully reconsidered and affirmed, and the principle they announced extended to cover the case of a United States officer who kills a person in defence of a United States judge travelling from one court to another in the discharge of official duty, and it is noteworthy that while Chief Justice Fuller and Justice Lamar, the two judges supposed to be the most careful of States' rights, dissented from the conclusion reached in this case, they did so on the ground that the writ of *habeas corpus*, the remedy resorted to to release Neagle

from the custody of the State court, was not authorized by the terms of the act of Congress, and they did not question the constitutional power of the government to protect its officers while in the discharge of their duty even by physical force exerted to the last extremity, but in fact expressly admitted, in the language of Justice Lamar, "that the supreme powers of the government extend to the protection of itself and all of its agencies, as well as to the preservation and perpetuation of its usefulness; and that these powers may be found not only in the express authorities conferred by the Constitution, but also in necessary and proper implications." An essential element of sovereignty is the exclusive right to determine the scope and validity of the authority conferred by a government on its own agents. When this right can be exercised by another government, the first loses its capacity for self-preservation.

From the decisions referred to, an adequate idea may be gained of the position of supremacy and power of the Federal Government, affirmatively defined by the Supreme Court of the United States.

At the same time that great tribunal has been careful of the reserved powers of the States, and has maintained for them a dignity and reality in harmony with their supreme importance to the perpetuity of our institutions.

Chief Justice Chase, speaking for the court in *Texas* v. *White*, *supra*, declares: "Not only can there be no loss of separate or independent autonomy to the States through their union under the Constitution; but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States."

In *Thomson* v. *Pacific R. R. Co.*, 76 U. S., 579, and in *Railroad Co.* v. *Peniston*, 85 U. S., 5, while it was held, in conformity with previous cases, that a State cannot tax the means employed by the United States Government nor the operation of its agencies, yet the doctrine as at first understood was materially limited

and the State power to tax the *property* of government agencies was emphatically declared.

In *Collector* v. *Day*, 78 U. S., 113, a similar limitation upon the taxing power of the United States was announced, and a United States tax upon the salary of a State judge was determined to be invalid, on the ground that the United States has no power to burden or control the legitimate operations of the State governments.

The same principle was held to apply in the case of the *United States* v. *Railroad Co.*, 84 U. S., 322, where it was decided that a municipal corporation within a State cannot be taxed by the United States, and the proposition firmly established that the instrumentalities employed by a State must be left free and unimpaired.

In the Slaughter-House Cases, 83 U. S. 36, the thirteenth, fourteenth and fifteenth amendments to the Constitution first came under review. It was contended that these amendments impaired and limited the police powers of the States and conferred upon the United States Government the power to prevent the States from abridging the privileges and immunities of their own citizens as such, but after most elaborate consideration it was determined that these amendments had no such extended effect, and that the States still possessed their police power unimpaired, and that the United States Government could not interpose between the States and their own citizens to prevent the abridgment of the privileges and immunities they enjoyed as citizens of the States.

In *United States* v. *Cruikshanks*, 92 U. S.. 542, it was determined that the right to assemble and petition the government for a redress of grievances, the right to bear arms, etc., were privileges and immunities to which the people were entitled as citizens of the States; that these rights could not be infringed by Congress, and for protection in them the people must look to their States and not to the United States, except in the case of a petition to Congress for a redress of grievances. Accordingly, so much of the enforcement act as provided otherwise was declared to be unconstitutional.

In *New York* v. *Louisiana*, 108 U. S., 76, it was determined that the Federal courts will not entertain a suit by one State

attempting to assert the rights of its citizens against another State.

In the Civil Rights Cases, 109 U. S., 3, where the question arose as to the power of Congress to confer upon all persons the full and equal enjoyment of accommodations and privileges of inns, public conveyances, theatres, etc., the thirteenth amendment was confined to the abolition of slavery in its reasonable sense, and the fourteenth was held to act only upon the States and not upon the citizens of the States, and the act in question known as the civil rights act was declared unconstitutional.

In re Ayres, 123 U. S., 443, and in the line of cases of which that was the culmination, the court decided that while, notwithstanding the eleventh amendment to the Constitution, the officers of a State may be sued to compel the performance of a purely ministerial act or as wrongdoers, and will not be allowed to justify under an unconstitutional State statute, yet no suit can be sustained against State officers, the effect of which would be directly to coerce the State to perform its contracts, or indirectly, by forbidding all those acts and doings which would constitute a branch of its contracts.

In *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S., 746, it was held that the provision of the Federal Constitution which forbids a State from impairing the obligations of contracts does not prevent a State from declining to be bound by a contract on a subject affecting the public health or public morals; in *Kidd* v. *Pearson*, 128 U. S., 1, that the police power of a State is as broad as its taxing power, and in *Minnesota and St. Louis R. R. Co.* v. *Beckwith*, 129 U. S., 26, that the fourteenth amendment does not limit the subjects in relation to which the police power of the States may act.

I have thus, at the risk of wearying you, sketched, as briefly as possible, the leading decisions since the war of the Supreme Court of the United States on those constitutional questions which bear upon the form and character of our system of government.

Although the work is not yet completed, we can easily perceive, from what has been accomplished, the direction of our national tendencies, and form a chart by which we may study out

the future. We may safely conclude that there will be no step backward, but that the principles which have been established will be given application to new cases as they arise by the courts and by national legislation.

The picture presented by these decisions is that of an indissoluble Union of indestructible States—of a strong Federal Government, robust in all its powers, confined by no narrow or technical construction, adequate to all national purposes and competent to all national emergencies; and of State governments, secure in all their reserved powers, protected against Federal oppression or usurpation and safe in the enjoyment of an independent and dignified, though limited, sovereignty.

It is beyond dispute that the national idea has been impressed upon our system with a steady and an unflinching hand. But this was the inevitable resultant from the concurring forces of successful war and developing civilization. It was, in fact, an easy extension and development of the principles announced by the great expounder of the Constitution himself.

In 1821, in delivering the judgment of the court in *Cohens* v. *Virginia*, he said: "The American States as well as the American people have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by their experience that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent States. Under the influence of this opinion, and thus instructed by experience, the American people, in the convention of their respective States, adopted the present Constitution. . . . . .

"But a constitution is framed for ages to come, and is designed to approach immortality, as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, so far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization as not to contain within itself the means of se-

curing the execution of its own laws against other dangers than those which occur every day. . . . .

"That the United States form, for many and for most important purposes, a single nation has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects it is supreme. It can then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States; they are members of one great empire—for some purposes sovereign, for some purposes subordinate."

And again in *McCullough* v. *Maryland:* "The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."

The great cases of *McCullough* v. *Maryland*, 4 Wheat, 315; *Cohens* v. *Virginia*, 6 Wheat, 264, and *Weston* v. *City Council of Charleston*, 2 Peters, 449, in all of which the court's judgment was delivered by Chief Justice Marshall, announced fundamental principles of construction which have never been successfully attacked, which have permitted easy application to modified conditions and from which has been slowly evolved, by the composite forces which have operated upon our national life, the imperishable national system which in itself is a monument to his immortal memory.

With all its forces balanced and all its powers complete, this dual system of government is our priceless heritage. It stands before the world as a new creation, adequate to the wants, conservative of the liberties and responsive to the aspirations of mankind.

But are all its perils in the past? Does the future contain for it no storm or stress? Is there no danger that threatens the accomplishment of its highest destiny?

The candid thinker must admit that there is—at least one, perhaps more—yet at least one not inherent in the system and the outgrowth of temporary conditions.

OUR MOST PRESSING DANGER IS THAT WE DO NOT VALUE OUR CITIZENSHIP.

In one sense this may be readily accounted for. Time was, and at no distant day, when the great problem before our statesmen was the populating of a territory almost boundless in extent and the development of our almost untouched resources. Around them stretched an uncultivated and unpeopled dominion vaster than that over which Cæsar swept with his Roman eagles and almost as limitless as Napoleon's dreams of empire. It was natural for them to open wide our portals and to invite the struggling and oppressed of every nation to share the great blessings of our boundless wealth, and to assist in dedicating this continent to the establishment and preservation of constitutional liberty. But now matters have changed. From thirteen organized States located directly on the Atlantic Ocean and the Gulf of Mexico, we have grown to forty-four, extending from ocean to ocean, and tenanted by nearly seventy millions of population. The unoccupied portion of our territory is now comparatively small, and, in connection with it, the natural growth and superior rights of our own people demand careful consideration.

The other nations of the world, influenced by our example, have become liberalized as civilization has developed, and their better classes, encouraged by the hope of reparation for their wrongs at home, are not driven so largely to the remedy of expatriation. Accordingly, the class of immigrants to this country has in a measure changed, and those who seek our shores are

largely anarchistic and lawless in their tendencies and not attracted by sympathy with the freedom of our institutions. The time has come for us to establish and cherish a distinctive American citizenship. Immigration must be limited and naturalization guarded by suitable restrictive regulations.

But this is not all. In the first part of this paper attention was called to the last three amendments to the Constitution.

The thirteenth, prohibiting slavery, was unqualifiedly approved.

The fourteenth, establishing a citizenship of the United States, surrounding it with adequate safeguards and dignifying it with suitable attributes, was declared to be sound in principle and beyond the reach of successful controversy.

But it was predicted that the fifteenth, which practically secures to the negro the right of suffrage, would in time receive a statesmanlike and patriotic re-examination.

This amendment has now been tried for about a quarter of a century. The result has been disastrous in the extreme. One section of this country, comprising all of the Southern States—being the section which suffered most from the ravages and results of war—has been doomed to an unending struggle with a dangerous and overwhelming social problem.

At a time when all its energies were needed for the building up of its waste places—when all its powers were taxed to adjust itself to its totally changed conditions—when all its wisdom should have been directed to the patriotic consideration of the great economic questions which affect this country's welfare, the fact is that our citizens from forty-five years old and under (with few exceptions) have never felt able to cast a vote on any issue except one, and that, the issue of whether the white man or the black man was to rule their States. Men now grown to forty years, and who, with those younger, constitute the most numerous part of our citizens, were too young to participate in the war. The whole of their experience of public affairs has been confined to the period since the reconstruction era. They want an opportunity to think on the great national questions which concern their country. They desire to develop amid surroundings congenial to the growth of a national—not a sectional—spirit. They long to aid in the solution of their country's problems, un-

influenced and untrammelled by conditions differentiating them from their fellow-countrymen. But at the South this has as yet been denied them.

Nor is this all. The purity of the ballot is the safeguard of republican institutions. When this is corrupted, the fountain is poisoned at its source. But in many of the States the necessity to insure control in the hands of the white race has caused offences against the ballot to be condoned if not approved. Every repetition of this offence weakens the moral sense of the people and is a blow at the safety of our institutions.

I have spoken of the *necessity* of insuring the control of the white man. In this there is no exaggeration. Waiving for the moment all considerations of race superiority, we cannot close our eyes to the fact that there are race antagonisms. This is not confined to any section or locality. It is inherent in the races. Witness the incident in Illinois, when the white children rose up and drove the negro children from their schools—the fact that in Ohio, while the law requires mixed schools, the negro scholars find themselves practically excluded and isolated from all companionship with their white schoolmates, and the universal fact, true North, East and West as well as South, that the feeling of caste has not been for a moment forgotten in establishing social relationships, but has been insisted on as rigorously in New York, Boston and Chicago as in Richmond or New Orleans.

But in considering the problem, the question of the relative superiority of the races cannot be waived. It is impossible to overlook the splendid accomplishments of the Caucasian race—how, notwithstanding common race beginnings, the world owes to their genius its civilization—and how in the arts and in literature, in war and in peace, they have touched the darkness that was over the face of the earth and have separated the day from the night.

"I love to believe," says Garfield, ... "that treasured up in American souls are all the unconscious influences of the great deeds of the Anglo-Saxon race from Agincourt to Bunker Hill."

The Caucasian race is the heir to the heroism and achievements of all the ages.

In the history of time, it has submitted to no master, and in the nineteenth century and amid the freedom of this republic, it is too late to expect it to accept the dominion of any other race.

In the interest of both races and of all sections, and whether considered from the standpoint of race antagonisms or relative superiority, it is necessary that the white man should rule. No enduring peace and happiness can exist on any other basis. This is already realized not only at the South but in many other sections of the Union.

The Hon. Hugh McCullough, once a member of President Grant's Cabinet, always a thinker, a statesman and a patriot, recently declared in public print that the country had once seen three States of this Union under negro control and that it would never consent to see it again.

But we are told that education is the solution of the race problem. Let it be granted, for the sake of the argument, that the African race is susceptible of elevation by education to an entire fitness for the duties and responsibilities of citizenship. The problem would not thereby be solved, but its dangers and its difficulties would be intensified. In one aspect of the case—namely, in the event that race antagonism would not be eradicated—the two contending forces would be brought by education nearer to an equality, the irrepressible conflict between them would become deadlier and more dangerous, and the struggle for the mastery would wreck the peace instead of establishing the harmony of the nation. While in the other aspect—namely, in the event of the disappearance of race antagonisms and a mutual acceptance of the principle of equality—there would be a mixture of races, and the result, a degenerate people, degraded below the level of their proud ancestry and the world's great Caucasian brotherhood.

"Four centuries have not elapsed," says the author of "An Appeal to Pharaoh," since the white man first set his foot on the eastern shore of the New World. Every step westward has been marked by the blood of the race he found here and drove before him. The Indian has been nearly swept from the face of so much of the North American Continent as is especially consecrated to the principle of the equality and brotherhood of man-

ADDENDA.

The following is the bill approved by the Association at its annual meeting, 1889, and referred to in the resolution adopted on page 46, *ante*.

AN ACT TO REGULATE THE LICENSING OF PERSONS TO PRACTICE LAW IN THIS STATE.

1. Be it enacted by the General Assembly of Virginia, That any male citizen above the age of twenty-one years, who has resided in this State for six months next preceding the date of his application for admission, of good moral character and who possesses the requisite qualifications of learning and ability, to be ascertained as hereinafter provided, shall be entitled to admission to practice law in all the courts of this State.

2. That no attorney or other person shall practice law in any of the courts of this State without being admitted thereto as hereinafter provided.

3. Every person desiring to practice law in the courts of this State, other than those provided for in the seventh section of this act, must apply by petition in writing to the circuit court of the county or the circuit or corporation or hustings court of the city or town in which he has resided for the period of six months next preceding, or, where he has so resided in the city of Richmond, to the circuit, hustings or chancery court of the city of Richmond, and in such petition must show that he is above the age of twenty-one years; that he has resided in the county or corporation, to the court of which application is made, for the period of six months next preceding; that he is a man of good moral character, and that he is desirous of being admitted to practice law in the courts of this State; and such petition may be filed in the clerk's office of such court, or presented in open court in term.

4. When any such application is received, whether in the clerk's office or in court, the clerk shall immediately docket the same, and the court at its next term, whether regular or special, if filed in vacation, or at the term during which it is filed, if filed in open court, unless continued on the motion of the applicant, shall appoint an examining board of not less than three members

of the bar in good standing, who shall strictly examine the applicant in open court touching his qualifications for admission as an attorney; and the said court shall also require and receive evidence of his probity and good moral character, and if, upon such actual examination, either conducted wholly by such committee or supplemented by an examination by the court itself, and having heard satisfactory evidence of his probity and good moral character, the said court shall be of opinion that such applicant is qualified to discharge the duties of attorney and is worthy to be admitted, the said court shall admit him to practice law, and shall enter of record that such examination has actually taken place, and that satisfactory proof of his probity and good moral character has been adduced; and a duly certified copy of such order shall be sufficient to entitle such applicant, on motion, to qualify in any of the courts of this State: provided, that if such court cannot conveniently hear such examination in open court, with due regard for other business pending before it, it shall be lawful for such examining committee to conduct such examination in writing elsewhere than in the presence of the court, which, when completed, shall be returned to and filed in the court, and the court shall pass thereon just as if such examination had taken place in open court, supplementing it by an additional examination, if it shall consider such additional examination necessary, and shall also require satisfactory evidence of the probity and good moral character of the applicant in the same manner as if such examination had taken place in open court: and provided further, that after any examination authorized by this section is completed, the examining committee shall in writing certify to the court whether, in the opinion of such committee, the application should be granted or rejected, but such recommendation shall not be binding on the court, which may, in its discretion, disregard the same.

5. Any person whose application is rejected by the court shall have the right to apply again after the expiration of six months from the date of such rejection, and so on after the expiration of each six months thereafter.

6. The clerk shall be entitled to charge for services rendered by him on such application the same fees that he is allowed by law to charge for other similar services, which fees shall be paid by the applicant.

7. Any person duly authorized and practicing as counsel or attorney at law in any State or Territory of the United States, or in the District of Columbia, may be, on motion, admitted to practice as such in the courts of this State without undergoing any examination.

8. Every person allowed to practice law in this State shall, before each court of record in which he intends to practice and in

which he shall not have qualified heretofore, take an oath that he will honestly demean himself in the practice of the law, and to the best of his ability execute his office of attorney at law; and shall also, when he is licensed in this State, take the oath of fidelity to the Commonwealth.

9. All licenses heretofore granted or signed by any judge of the Supreme Court of Appeals of this State since the fourteenth day of January, eighteen hundred and sixty-four, and all other licenses heretofore legally granted, shall be as valid as if granted under this act.

10. If any person shall practice law in any court of this State without being so licensed, admitted or authorized, or without taking the oaths required, he shall forfeit one hundred and fifty dollars for each case in which he shall appear as attorney, one-half whereof shall be to the informer: provided, however, that this penalty shall not be incurred by any attorney for instituting an action or suit after being admitted, if he shall qualify in the court in which such action or suit is instituted at the term during which such action or suit is heard.

11. Sections 3191, 3192, 3193 and 3194 of the Code of 1887, and all acts and parts of acts in conflict herewith, are hereby repealed.

12. This act shall be in force from its passage.

CODE OF ETHICS.

Adopted July 24th, 1889.—Minutes 1889, page 25.

The purity and efficiency of judicial administration, which under our system is largely government itself, depends as much upon the character, conduct and demeanor of attorneys in their great trust as upon the fidelity and learning of courts or the honesty and intelligence of juries.

"There is, perhaps, no profession after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law. There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the lines of strict integrity; in which so many delicate and difficult questions of duty are constantly arising. There are pitfalls and man-traps at every step, and the mere youth, at the very outset of his career, needs often the prudence of self-denial, as well as the moral courage, which belong commonly to riper years. High moral principle is his only safe guide: the only torch to light his way amidst darkness and obstruction."—*Sharswood.*

No rule will determine an attorney's duty in the varying phases of every case. What is right and proper must, in the absence of statutory rules and an authoritative code, be ascertained in view of the peculiar facts, in the light of conscience, and the conduct of honorable and distinguished attorneys in similar cases, and by analogy to the duties enjoined by statute, and the rules of good neighborhood.

The following general rules are adopted by the Virginia State Bar Association for the guidance of its members:

Duty of Attorneys to Courts and Judicial Officers.

1. The respect enjoined by law for courts and judicial officers is exacted for the sake of the office, and not for the individual who administers it. Bad opinion of the incumbent, however well founded, cannot excuse the withholding of the respect due the office, while administering its functions.

2. The proprieties of the judicial station, in a great measure, disable the judge from defending himself against strictures upon his official conduct. For this reason, and because such criticisms tend to impair public confidence in the administration of justice, attorneys should, as a rule, refrain from published criticism of judicial conduct, especially in reference to causes in which they have been of counsel, otherwise than in courts of review, or when the conduct of the judge is necessarily involved in determining his removal from or continuance in office.

3. Marked attention and unusual hospitality to a judge, when the relations of the parties are such that they would not otherwise be extended, subject both judge and attorney to misconstruction, and should be sedulously avoided. A self-respecting independence in the discharge of the attorney's duties, which, at the same time, does not withhold the courtesy and respect due the judge's station, is the only just foundation for cordial, personal and official relations between Bench and Bar. All attempts by means beyond these to gain special personal consideration and favor of a judge are disreputable.

4. Courts and judicial officers, in the rightful exercise of their functions, should always receive the support and countenance of attorneys against unjust criticism and popular clamor; and it is an attorney's duty to give them his moral support in all proper ways, and particularly by setting a good example in his own person of obedience to law.

5. The utmost candor and fairness should characterize the dealings of attorneys with the courts and with each other. Knowingly citing as authority an overruled case, or reading a repealed statute as in existence; knowingly misquoting the language of a decision or text-book; knowingly misstating the contents of a paper, the testimony of a witness, or the language or arguments of the opposite counsel; offering evidence which is known the court must reject as illegal, to get it before a jury under guise of arguing its admissibility, and all kindred practices are deceits and evasions unworthy of attorneys.

Purposely concealing or withholding in the opening arguments, positions intended finally to be relied on, in order that opposite counsel may not discuss them, is unprofessional. Courts and juries look with disfavor on such practices, and are quick to suspect the weakness of the cause which has need to resort to them.

In the argument of demurrers, admission of evidence, and other questions of law, counsel should carefully refrain from "side-bar" remarks and sparring discourse to influence the jury or by-standers. Personal colloquies between counsel tend to delay and promote unseemingly wrangling, and ought to be discouraged.

6. Attorneys owe it to the courts, and the public whose business the courts transact, as well as to their own clients, to be

punctual in attendance on their causes; and whenever an attorney is late he should apologize or explain his absence.

7. One side must always lose the cause; and it is not wise or respectful to the court for attorneys to display temper because of an adverse ruling.

Duty of Attorneys to Each Other, to Clients and to the Public.

8. An attorney should strive, at all times, to uphold the honor, maintain the dignity, and promote the usefulness of the profession; for it is so interwoven with the administration of justice, that whatever redounds to the good of one advances the other; and the attorney thus discharges, not merely an obligation to his brothers, but a high duty to the State and his fellow-man.

9. An attorney should not speak slightingly or disparagingly of his profession, or pander in any way to the unjust popular prejudices against it; and he should scrupulously refrain at all times, and all relations of life, from availing himself of any prejudice or popular misconception against lawyers, in order to carry a point against a brother attorney.

10. Nothing has been more potential in creating and pandering to popular prejudice against lawyers as a class, and in withholding from the profession the full measure of public esteem and confidence which belong to the proper discharge of its duties, than the false claim, often set up by the unscrupulous in defence of questionable transactions, that it is an attorney's duty to do everything to succeed in his client's cause.

An attorney "owes entire devotion to the interest of his client, warm zeal in the maintenance and defence of his cause, and the exertion of the utmost skill and ability," to the end that nothing may be taken or withheld from him save by the rules of law, legally applied. No sacrifice or peril, even to loss of life itself, can absolve from the fearless discharge of this duty. Nevertheless, it is steadfastly to be borne in mind that the great trust is to be performed within and not without the bounds of the law which creates it. The attorney's office does not destroy man's accountability to his Creator, or loosen the duty of obedience to law, and the obligation to his neighbor; and it does not permit, much less demand, violation of law, or any manner of fraud or chicanery, for the client's sake.

11. Attorneys should fearlessly expose before the proper tribunals corrupt or dishonest conduct in the profession; and there should never be any hesitancy in accepting employment against an attorney who has wronged his client.

12. An attorney appearing or continuing as private counsel in the prosecution for a crime of which he believes the accused innocent, forswears himself. The State's attorney is criminal, if he

presses for a conviction, when upon the evidence he believes the prisoner innocent. If the evidence is not plain enough to justify a *nolle prosequi* a public prosecutor should submit the case, with such comments as are pertinent, accompanied by a candid statement of his own doubts.

13. An attorney cannot reject the defenee of a person accused of a criminal offence because he knows or believes him guilty. It is his duty by all fair and lawful means to present such defences as the law of the land permits, to the end that no one may be deprived of life or liberty but by due process of law.

14. An attorney must decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong.

15. It is a bad practice for an attorney to communicate or argue privately with the judge as to the merits of his cause.

16. Newspaper advertisements, circulars and business cards, tendering professional services to the general public, are proper; but special solicitation of particular individuals to become clients is disreputable. Indirect advertisements for business, by furnishing or inspiring editorials or press notices regarding causes in which the attorney takes part, the manner in which they were conducted, the importance of his positions, the magnitude of the interests involved, and all other like self-laudation, is of evil tendency and wholly unprofessional.

17. Newspaper publications by an attorney as to the merits of pending or anticipated litigation call forth discussion and reply from the opposite party, tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice. It requires a strong case to justify such publications; and when proper it is unproressional to make them anonymously.

18. When an attorney is witness for his client, except as to formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the cause to other counsel. Except when essential to the ends of justice, an attorney should scrupulously avoid testifying in court in behalf of his client as to any matter.

19. Assertions, sometimes made by counsel in argument, of a personal belief of the client's innocence or the justice of his cause, are to be discouraged.

20. It is indecent to hunt up defects in titles, and the like, and inform thereof, in order to be employed to bring suit; or to seek out a person supposed to have a cause of action, and endeavor to get a fee to litigate about it. Except where ties of blood, relationship or trust make it an attorney's duty, it is unprofessional to volunteer advice to bring a law suit. Stirring up strife and litigation is forbidden by law and disreputable in morals.

21. Communications and confidence between client and attorney

are the property and secrets of the client, and cannot be divulged except at his instance; even the death of the client does not absolve the attorney from his obligation of secrecy.

22. The duty not to divulge the secrets of clients extends further than mere silence by the attorney, and forbids accepting retainers or employment afterwards from others, involving the client's interest in the matters about which the confidence was reposed. When the secrets or confidence of a former client may be availed of or be material in a subsequent suit, as a basis of any judgment which may injuriously affect his rights, the attorney cannot appear in such cause without the consent of his former client.

23. An attorney can never attack an instrument or paper drawn by him for any infirmity apparent on its face; nor for any other cause where confidence has been reposed as to the facts concerning it. Where the attorney acted as a mere scrivener, and was not consulted as to the facts, and, unknown to him, the transaction amounted to a violation of the laws, he may assail it on that ground in suits between third persons, or between parties to the instrument and strangers.

24. An attorney openly, and in his true character, may render purely professional services before committees regarding proposed legislation, and in advocacy of claims before departments of the government, upon the same principles of ethics which justify his appearance before the courts; but it is immoral and illegal for an attorney so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason or understanding, to influence action.

25. An attorney can never represent conflicting interests in the same suit or transaction, except by express consent of all so concerned, with full knowledge of the facts. Even then such a position is embarrassing and ought to be avoided. An attorney represents conflicting interests, within the meaning of this rule, when it is his duty, in behalf of one of his clients, to contend for that which duty to other clients in the transaction requires him to oppose.

26. "It is not a desirable professional reputation to live and die with—that of a rough tongue, which makes a man to be sought out and retained to gratify the malevolent feeling of a suitor, in hearing the other side well lashed and vilified."

27. An attorney is under no obligation to minister to the malevolence or prejudice of a client in the trial or conduct of a cause. The client cannot be made the keeper of an attorney's conscience in professional matters. He cannot demand as of right that his attorney shall abuse the opposite party or indulge in offensive personalities. The attorney, under the solemnity of his oath, must determine for himself whether such a course is essential to the ends of justice, and therefore justifiable.

28. Clients, and not their attorneys, are the litigants; and whatever may be the ill-feeling existing between clients, it is unprofessional for attorneys to partake of it in their conduct and demeanor to each other, or to suitors in the case.

29. In the conduct of litigation, and the trial of causes, the attorneys should try the merits of the cause, and not try each other. It is not proper to allude to, or comment upon, the personal history, or mental or physical peculiarities or idiosyncrasies of opposite counsel. Personalities should always be avoided, and the utmost courtesy always extended to an honorable opponent.

30. As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite attorney to trial when he is under affliction or bereavement; forcing the trial on a particular day to the serious injury of the opposite attorney, when no harm will result from a trial at a different time; the time allowed for signing a bill of exceptions, crossing interrogatories and the like, the attorney must be allowed to judge. No client has a right to demand that his attorney shall be illiberal in such matters, or that he should do anything therein repugnant to his own sense of honor and propriety; and if such a course is insisted on, the attorney should retire from the cause.

31. The miscarriage to which justice is subject, and the uncertainty of predicting results, admonish attorneys to beware of bold and confident assurances to clients, especially where the employment depends upon the assurance, and the case is not plain.

32. Prompt preparation for trial, punctuality in answering letters and keeping engagements, are due from an attorney to his client, and do much to strengthen their confidence and friendship.

33. An attorney is in honor bound to disclose to the client at the time of retainer all the circumstances of his relation to the parties, or interest or connection with the controversy which might justly influence the client in the selection of his attorney. He must decline to appear in any cause where his obligations or relations to the opposite party will hinder or seriously embarrass the full and fearless discharge of all his duties.

34. An attorney should endeavor to obtain full knowledge of his client's cause before advising him, and is bound to give him a candid opinion of the merits and probable result of his cause. When the controversy will admit of it, he ought to seek to adjust it without litigation, if practicable.

35. Money or other trust property coming into the possession of the attorney should be promptly reported, and never commingled with his private property or used by him, except with the client's knowledge and consent.

36. Attorneys should, as far as possible, avoid becoming either borrowers or creditors of their clients; and they ought scrupulously refrain from bargaining about the subject-matter of the litigation, so long as the relation of attorney and client continues.

37. Natural solicitude of clients often prompts them to offer assistance of additional counsel. This should not be met, as it sometimes is, as evidence of want of confidence; but, after advising frankly with the client, it should be left to his determination.

38. Important agreements affecting the rights of clients should, as far as possible, be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made, because not reduced to writing, as required by rules of court.

39. Attorneys should not ignore known customs or practice of the Bar of a particular court, even when the law permits, without giving opposing counsel timely notice.

40. An attorney should not attempt to compromise with the opposite party without notifying his attorney, if practicable.

41. When attorneys jointly associated in a cause cannot agree as to any matter vital to the interest of their client, the course to be pursued should be left to his determination. The client's decision should be cheerfully acquiesced in, unless the nature of the difference makes it impracticable for the attorney to co-operate heartily and effectively, in which event it is his duty to ask to be discharged.

42. An attorney ought not to engage in discussion or arguments about the merits of the case with the opposite party, without notice to his attorney.

43. Satisfactory relations between attorney and client are best preserved by a frank and explicit understanding at the outset, as to the amount of the attorney's compensation; and, where it is possible, this should always be agreed on in advance.

44. In general, it is better to yield something to a client's dissatisfaction at the amount of the fee, though the sum be reasonaable, than to engage in a law suit to justify it, which ought always to be avoided, except as a last resort to prevent imposition and fraud.

45. In fixing fees the following elements should be considered: 1st. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to properly conduct the cause. 2d. Whether the particular case will debar the attorney's appearance for others in cases likely to arise out of the transaction and in which there is a reasonable expectation that the attorney would otherwise be employed; and herein of the loss of other business while employed in the particular case, and the antagonism with other clients growing out of the employment. 3d. The customary charges of the Bar for similar services. 4th. The real amount involved and the benefit resulting from the service. 5th.

Whether the compensation was contingent or assured. 6th. Is the client a regular one, retaining the attorney in all his business? No one of these considerations is in itself controlling. They are mere guides in ascertaining what the service was really worth; and in fixing the amount it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

46. Contingent fees may be contracted for; but they lead to many abuses, and certain compensation is to be preferred.

47. Casual and slight services should be rendered without charge by one attorney to another in his personal cause; but when the service goes beyond this, an attorney may be charged as other clients. Ordinary advice and services to the family of a deceased attorney should be rendered without charge in most instances, and, where the circumstances make it proper to charge, the fees should generally be less than in case of other clients.

48. Witnesses and suitors should be treated with fairness and kindness. When essential to the ends of justice to arraign their conduct or testimony, it should be done without vilification or unnecessary harshness. Fierceness of manner and uncivil behavior can add nothing to the truthful dissection of a false witness' testimony, and often rob deserved strictures of proper weight.

49. It is the duty of the court and its officers to provide for the comfort of jurors. Displaying special concern for their comfort and volunteering to ask favors for them while they are present—such as frequent motions to adjourn trials, or take a recess, solely on the ground of the jury's fatigue or hunger, the uncomfortableness of their seats or the court-room, and the like—should be avoided. Such intervention of attorneys, when proper, ought to be had privately with the court, whereby there will be no apperance of fawning upon the jury, nor ground for ill-feeling of the jury towards court or opposite counsel, if such requests are denied. For like reasons one attorney should never ask another in the presence of the jury to consent to its discharge or dispersion; and when such a request is made by the court, the attorneys, without indicating their preference, should ask to be heard after the jury withdraws. And all propositions from counsel to dispense with argument should be made and discussed out of the hearing of the jury.

50. An attorney ought never to converse privately with jurors about the case; and must avoid all unnecessary communication, even as to matters foreign to the cause, both before and during the trial. Any other course, no matter how blameless the attorney's motives, gives color for imputing evil designs, and often leads to scandal in the administration of justice.

51. An attorney assigned as counsel for an indigent prisoner ought not to ask to be excused for any light cause, and should always be a friend to the defenceless and oppressed.

INDEX.


Stanford Law Library
3 6105 063 468 818



